Supreme Court, U. S.
FILED
JUL 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-699

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare,

Appellant,

—v.—

LEON GOLDFARB,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

RUTH BADER GINSBURG
MELVIN L. WULF
KATHLEEN WILLERT PERATIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

NADINE TAUB
Women's Rights Litigation Clinic
175 University Avenue
Newark, New Jersey 07102

Attorneys for Appellee

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
38

INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Question Presented 2

Statute Involved 3

Statement of the Case 3

Summary of Argument 6

ARGUMENT:

I. The gender-based criterion established by 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) discriminates invidiously against gainfully-employed women insured under social security as well as against their surviving spouses 12

A. The statute discriminates against gainfully-employed women insured under social security 12

B. The statute discriminates against surviving spouses of female workers insured under social security 18

II. Employment of a gender-based criterion as a means to determine benefits due on the earnings record of an individual insured under social security constitutes a denial of the equal protection of the laws guaranteed by the due process clause of the fifth amendment 19

PAGE

A. The 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) gender line favors marital units with a male insured individual over units with a female insured individual; this favoritism does not fairly and substantially advance legitimate governmental ends 23

B. The legislative presumption underlying the §402 differential, that women depend on men but not vice versa, is today further than ever from the truth and in fact never matched reality 25

C. Exclusion of the spouse of a working woman from social insurance benefits accorded the spouse of a working man does not operate to remedy the effects of past economic discrimination against women 34

D. Administrative convenience does not justify gross categorization by gender 38

E. Budgetary considerations do not justify resort to an otherwise invidious gender classification 40

III. Employment-related benefits distributed by government must be allocated with an even hand and without resort to classification based on gender per se 47

A. Decisions of this Court and lower federal courts establish that classification based on gender per se is impermissible in employment-related regulation 47

PAGE

B. Federal laws governing private and public sector employment require employers to accord spouses of female employees all fringe benefits accorded spouses of male employees; these laws reflect the overriding concern of Congress to eliminate gender-based discrimination in the economic sphere 51

IV. Consistent with the dominant congressional purpose, to provide old-age and survivors insurance in a manner that respects the dignity of the aged, the Court should declare 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) unconstitutional insofar as these provisions deny to the spouse of a female wage earner benefits accorded the spouse of a male wage earner 60

CONCLUSION 70

ADDENDUM 71

TABLE OF AUTHORITIES

Cases:

Abbott v. *Weinberger*, —— F. Supp. —— (N.D. Ohio, February 12, 1976), *jurisdictional statement filed sub nom. Mathews* v. *Abbott*, No. 75-1643 .....4, 16, 60

Andrews v. *Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir.), *cert. dismissed as improvidently granted*, 44 U.S.L.W. 4627 (May 3, 1976) 49

Bartmess v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) 53

PAGE

Belle Terre v. *Boraas*, 416 U.S. 1 (1974) 35
Bowen v. *Hackett*, 361 F. Supp. 854 (D.R.I. 1973) 16, 43, 49, 50, 64
Brennan v. *Corning Glass Works*, 417 U.S. 188 (1974) 66
Burrow v. *Kapfhammer*, 284 Ky. 753, 145 S.W.2d 1067 (1940) 64

Chastang v. *Flynn and Emrich Co.*, 365 F. Supp. 957 (D. Md. 1973) 52
Chatman v. *Barnes*, 357 F. Supp. 9 (N.D. Okla. 1973) ..43, 64
Clark v. *Celebrezze*, 230 F. Supp. 798 (D. Mass. 1974), *aff'd*, 344 F.2d 479 (1st Cir. 1965) 6, 27, 30, 34, 40
Coffin v. *Secretary of Health, Education and Welfare*, 400 F. Supp. 953 (D.D.C. 1975), *appeal docketed sub nom. Mathews* v. *Coffin*, No. 75-791 .....3, 4, 16, 40, 60
Colburn v. *Colburn*, 20 Md. App. 346, 316 A.2d 283 (Md. Ct. App. 1974) 68

de Castro v. *Weinberger*, 403 F. Supp. 23 (N.D. Ill. 1975) 43, 64
Demiragh v. *DeVos*, 476 F.2d 403 (2d Cir. 1973) 43, 64
Diaz v. *Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) 53

EEOC Decisions, Case No. CL 7-6-694, CCH Emp. Practices Guide ¶6009 (May 19, 1969) 52
EEOC Decisions, Case No. YNY9-034, CCH Emp. Practices Guide ¶6050 (June 16, 1969) 52
EEOC Decision No. 70-75, CCH Emp. Practices Guide ¶6049 (August 13, 1969) 53

PAGE

EEOC Decision No. 70-510, CCH Emp. Practices Guide ¶6132 (February 4, 1970) 52
EEOC Decision No. 70-513, CCH Emp. Practices Guide ¶6114 (February 4, 1970) 52
EEOC Decision No. 70-660, CCH Emp. Practices Guide ¶6133 (March 24, 1970) 52
EEOC Decision No. 71-562, CCH Emp. Practices Guide ¶6184 (December 4, 1970) 52
EEOC Decision No. 71-1100, CCH Emp. Practices Guide ¶6197 (December 31, 1970) 52
EEOC Decision No. 72-0702, CCH Emp. Practices Guide ¶6320 (December 27, 1971) 52
EEOC Decision No. 72-1919, CCH Emp. Practices Guide ¶6370 (June 6, 1972) 52
Eslinger v. *Thomas*, 476 F.2d 225 (4th Cir. 1973) 49

Fitzpatrick v. *Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), *appeal on another point*, 519 F.2d 559 (2d Cir.), *cert. granted*, 44 U.S.L.W. 3358 (1975) 52
Frontiero v. *Richardson*, 411 U.S. 677 (1973) .....*passim*

Geduldig v. *Aiello*, 417 U.S. 484 (1974) 19, 35
Graham v. *Richardson*, 403 U.S. 365 (1971) 41, 42, 63
Green v. *Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973) 49
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 52
Gruenwald v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968) 36, 37

Henslee v. *Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595 (1949) 49

Iowa-Des Moines Nat'l Bank v. *Bennett*, 284 U.S. 239 (1931) 62

PAGE

Jablon v. *Secretary of Health, Education and Welfare*, 339 F. Supp. 118 (D. Md. 1975), *appeal docketed sub nom. Mathews* v. *Jablon*, No. 75-739 .....3, 4, 16, 18, 35, 40, 60, 65, 66

Kahn v. *Shevin*, 416 U.S. 351 (1974) 34
Kohr v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa. 1974), *judgment vacated*, 422 U.S. 1050 (1975) 36, 37

Labine v. *Vincent*, 401 U.S. 532 (1971) 35
Legatos, Estate of, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) 64
Lewis v. *Cohen*, —— F. Supp. —— (E.D. Pa. March 5, 1976) [44 U.S.L.W. 2457] 36

Mathews v. *Lucas*, —— U.S. —— (June 29, 1976) 19, 21, 38, 48
Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974) 41, 62
Mengelkoch v. *Industrial Welfare Comm'n*, 442 F.2d 1119 (9th Cir. 1971) 50
Miller v. *Laird*, 349 F. Supp. 1034 (D.D.C. 1972) 43, 64
Moritz v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) 63

New Jersey Welfare Rights Organization v. *Cahill*, 411 U.S. 619 (1973), *summarily reversing* 349 F. Supp. 491 (D.N.J. 1972) 41, 42, 63
Norton v. *Weinberger*, 390 F. Supp. 1084 (D. Md. 1975), *aff'd sub nom. Norton* v. *Mathews*, —— U.S. —— (June 29, 1976) 35

Page v. *Welfare Comm'n*, Connecticut Law Journal, February 24, 1976, p. 3 (Conn. Sup. Ct.), excerpted in 44 U.S.L.W. 2426-27 .....49, 64

PAGE

Paterson Tavern & Grill Owners Ass'n, Inc. v. *Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970) 50
Polelle v. *Secretary of Health, Education and Welfare*, 386 F. Supp. 443 (E.D. Ill. 1974) 36

Quong Ham Wah Co. v. *Industrial Accident Comm'n*, 184 Cal. 26, 192 P. 1021 (1920), *appeal dismissed*, 255 U.S. 445 (1921) 64

Reed v. *Reed*, 404 U.S. 71 (1971) 16, 17, 19, 20, 21, 22, 24
Rosen v. *Public Service Elec. & Gas Co.*, 477 F.2d 90 (3d Cir. 1973) 52
Rosenfeld v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971) 53
F. S. Royster Guano Co. v. *Virginia*, 253 U.S. 412 (1920) 19

Sail'er Inn, Inc. v. *Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971) 50
Schlesinger v. *Ballard*, 419 U.S. 498 (1975) 34, 35, 41
Schmoll v. *Creecy*, 54 N.J. 194, 254 A.2d 525 (1969) .. 62
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 41, 42, 63
Shpritzer v. *Lang*, 17 A.D.2d 285, 234 N.Y.S.2d 285 (1st Dep't 1962), *aff'd*, 13 N.Y.2d 744, 241 N.Y.S.2d 869 (1963) 50
Silbowitz v. *Secretary of Health, Education and Welfare*, 397 F. Supp. 862 (S.D. Fla. 1975), *appeal docketed sub nom. Mathews* v. *Silbowitz*, No. 75-712 .....3, 4, 15, 60
Skinner v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) 62
Sosna v. *Iowa*, 419 U.S. 393 (1975) 41

PAGE

Stanton v. *Stanton*, 421 U.S. 7 (1975) 17, 20, 21, 24, 35, 40, 48, 60

Stevenson v. *Castles*, Civ. No. 7452 (D.C.Z. November 15, 1974) 49

Taylor v. *Louisiana*, 419 U.S. 522 (1975) 20, 24, 30, 35, 38, 48

United States Dep't of Agriculture v. *Moreno*, 413 U.S. 528 (1973) 41, 42, 62, 63

Vaccarella v. *Fusari*, 365 F. Supp. 1164 (D. Conn. 1973) 43, 64

Vlandis v. *Kline*, 412 U.S. 441 (1973) 43

Vuyanich v. *Republic Nat'l Bank*, 409 F. Supp. 1083 (N.D. Tex. 1976) 24

Weinberger v. *Salfi*, 422 U.S. 749 (1975) 19

Weinberger v. *Wiesenfeld*, 420 U.S. 636 (1975) .....*passim*

Welsh v. *United States*, 398 U.S. 333 (1970) 62

White v. *Fleming*, 522 F.2d 730 (7th Cir. 1975) 49

Wilson v. *Hacker*, 101 N.Y.S.2d 461 (Sup. Ct. 1950) .. 50

Wood v. *Mills*, 528 F.2d 321 (4th Cir. 1975) 21, 49

Yale & Towne Mfg. Co. v. *Travis*, 262 F. 576 (S.D.N.Y. 1919), *aff'd*, 252 U.S. 60 (1920) 64

Constitutional Provisions:

United States Constitution

Fifth Amendment 2, 3, 19, 22, 61, 63

Fourteenth Amendment 3, 22, 50

PAGE

Federal Statutes, Proposed Legislation, Executive Orders:

Act of Aug. 14, 1935, ch. 531, §202, 49 Stat. 623 25

Act of Aug. 10, 1939, ch. 666, §§201, 202, 53 Stat. 1362-66 .....25, 28

Act of Aug. 28, 1950, ch. 809, §101(a), 64 Stat. 483-485 .....26, 28

Act of July 30, 1965, P.L. 89-97, §308, 79 Stat. 375 26

Act of Jan. 2, 1968, P.L. 90-248, §151, 81 Stat. 860 28

Act of Oct. 30, 1972, §104, P.L. 92-603, 86 Stat. 1335, 1340 .....26, 37

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§2000e et seq. (Supp. IV, 1974), amending 42 U.S.C. §§2000e et seq. (1970) 49, 50, 51, 52

Education Amendments of 1972, Title IX, 20 U.S.C. §§1681 et seq. (Supp. IV, 1974) 51, 57

Equal Credit Opportunity Act of 1975, P.L. 93-495, 88 Stat. 1521, as amended by P.L. 94-239, 94th Cong., H.R. 6516 (March 23, 1976) 29

Equal Pay Act of 1963, 29 U.S.C. §206(d) (1970) ..51, 53, 66

Executive Order 11246, as amended by Executive Order 11375, 3 C.F.R. 169 (1974), 42 U.S.C. §2000e note .. 51

5 U.S.C. §2108 (Supp. IV, 1974) 54

5 U.S.C. §5924 (Supp. IV, 1974) 55

5 U.S.C. §7151 (1970) 54

5 U.S.C. §7152 (Supp. IV, 1974) 36, 51, 53, 54, 55

5 U.S.C. §7154 (1970) 54

5 U.S.C. §§8101(6) and 8101(11) (Supp. IV, 1974) 55

5 U.S.C. §8341 (Supp. IV, 1974) 55

5 U.S.C. §8902(f) (1970) 54

37 U.S.C. §401 (Supp. IV, 1974) 55

PAGE

38 U.S.C. §102(b) (Supp. IV, 1974) 54
38 U.S.C. §1682 (1970) 54

42 U.S.C. §402(g) 14, 60
42 U.S.C. §405(g) (1970) 4
42 U.S.C. §414(a)(1) (Supp. IV, 1974) 66
42 U.S.C. §415 (1970) 39
42 U.S.C. §1303 (1970) 66
42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) .....*passim*

H.R. 11555, 94th Cong., 2d Sess. (1976) 67

S. 1729, 94th Cong., 1st Sess. (1975) 67

Administrative Regulations, Opinions:

53 Comp. Gen. 148 (August 31, 1973) 55, 61

Dep't of Health, Education, and Welfare, Final Title IX Regulations Implementing Education Amendments of 1972 Prohibiting Sex Discrimination in Education, 45 C.F.R. §86.56-58 .....57, 58

Dep't of Health, Education, and Welfare, Higher Education Guidelines pursuant to Executive Order 11246 (Oct. 1, 1972) 58

Equal Employment Opportunity Commission, Sex Discrimination Guidelines, 29 C.F.R. §§1604.1-1604.10 ..39, 51

Office of Federal Contract Compliance, Sex Discrimination Guidelines for Government Contractors, 41 C.F.R. §60-20 51

Veterans Administration, Statement of Policy, 40 F.R. 27744 (July 1, 1975) 61

Wage & Hour Opinion Letter No. 388, CCH Emp. Practices Guide ¶1208.59 (Oct. 14, 1965) 53

PAGE

Wage & Hour Opinion Letter No. 420, CCH Emp. Practices Guide ¶1208.591 (Feb. 11, 1966) 53
Wage & Hour Opinion Letter No. 425, CCH Emp. Practices Guide ¶1208.52 (Feb. 11, 1966) 53
Wage & Hour Opinion Letter No. 1275, CCH Emp. Practices Guide ¶5178 (Jan. 15, 1973) 53

Other Authorities Cited:

Ball, Hearings on the Economic Problems of Women, Before the Joint Economic Committee, United States Congress, Part Two, July 24-30, 1973 43
Bell, Working Wives and Family Income, in Economic Independence for Women (Chapman ed. 1976) 29, 34
Bixby, Women and Social Security in the United States, 35 Soc. Sec. Bull. 3 (1972) 24
Boskin, The Effects of Government Expenditures and Taxes on Female Labor, 64 Am. Economic Rev. 251 (1974) 17
Brief for Appellant, *Reed* v. *Reed,* 404 U.S. 71 (1971) 21
Brief for Appellant, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) 41
Brief for the Appellant, *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975) 16, 23, 45
Brief for the Appellees, *Frontiero* v. *Richardson,* 411 U.S. 677 (1973) 16, 23, 29, 39
Bryant, Evans & Powell, *American Women in International Women's Year* 41 (Market Opinion Research 1975) 26

Chafe, Looking Backward in Order to Look Forward: Women, Work and Social Values in America, in American Assembly, Women and the American Economy 6 (Kreps ed. 1976) 36, 48
Chafe, The American Woman (1972) 48

PAGE

Chapman, Sex Discrimination in Credit: The Backlash of Economic Dependency, in Economic Independence for Women 263 (Chapman ed. 1976) 29

Citizens' Advisory Council on the Status of Women, A Memorandum on the Proposed Equal Rights Amendment to the United States Constitution (1970), reprinted in Hearings on S.J. Res. 61 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970) 22

Citizens' Advisory Council on the Status of Women, Women in 1971, Appendix C (1972) 26

Citizens' Advisory Council on the Status of Women, Women in 1975 (March 1976) 17

Davidson, Ginsburg & Kay, Sex-Based Discrimination, 1975 Supplement (West Pub. Co.) 35

Economic Independence for Women (Chapman ed. 1976) 17

Equal Rights for Men and Women, S. Rep. 92-689, 92d Cong., 2d Sess. (1972) 22

Financing the Social Security System, Hearings Before the Subcommittee on Social Security, House Committee on Ways and Means, 94th Cong., 1st Sess. (May, June 1975) 4, 5, 13, 14, 16, 17, 40, 41, 44, 45, 46

Freed & Foster, *Taking Out the Fault but not the Sting,* 12 Trial No. 4 (April 1976) 56

Griffiths, *Sex Discrimination in Income Security Programs,* 49 Notre Dame Lawyer 534 (1974) 28

PAGE

Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972) 20

Hearings on H.R. 6635, Social Security Amendments of 1939, Before the House Committee on Ways and Means, 76th Cong., 1st Sess. (1939) 45

Hoskins & Bixby, Social Security Administration Research Report No. 42, Women and Social Security: Law and Policy in Five Countries (1973) 24, 25

H.R. Rep. No. 91-1469, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Admin. News, Vol. III, 5931 55

Income Security for Older Women: Path to Equality, Report by the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, 94th Cong., 1st Sess. 2 (December 1975) 16

Jacobson, American Marriage and Divorce (1959) 26

Janeway, Man's World, Woman's Place: A Study in Social Mythology (1971) 48

Jurisdictional Statement, Brief of American Civil Liberties Union, Amicus Curiae, and Joint Reply Brief of Appellants and American Civil Liberties Union, *Frontiero* v. *Richardson,* 411 U.S. 677 (1973) 21

Jurisdictional Statement, *Mathews* v. *Coffin,* No. 75-791 (December 3, 1975) 4

Jurisdictional Statement, *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975) 60

Matthews, *Women Should Have Equal Rights with Men,* 12 A.B.A.J. 117 (1926) 37

PAGE

Memorandum for the United States as Amicus Curiae, *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) 22
Motion to Affirm, *Mathews* v. *Coffin*, No. 75-791 6
Motion to Affirm, *Mathews* v. *Jablon*, No. 75-739 .....6, 40

Nagel & Weitzman, *Women As Litigants*, 23 Hast. L.J. 171 (1971) 26
New York Times, March 7, 1976, Section 4, p. 3, col. 2 14
1975 Manpower Report of the President 33
1976 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds 45
96 Cong. Rec. 8491, 81st Cong., 2d Sess. (1950) (remarks of Sen. George) 65
Note, 89 Harv. L. Rev. 95 (1975) 15, 18, 21, 24, 37, 50, 68
Note, 55 Harv. L. Rev. 1030 (1942) 65
Note, *Sex Classifications in the Social Security Benefit Structure*, 49 Ind. L.J. 181 (1973) 25, 29, 59, 68
Note, 9 U. Mich. J. L. Ref. 138 (1975) 56, 67

116 Cong. Rec. 28005 (1970) (remarks of Rep. Griffiths) 22
121 Cong. Rec. S7949 (daily ed. May 13, 1975) (remarks of Sen. Bayh) 67
122 Cong. Rec. H1666 (daily ed. March 4, 1976) 46
122 Cong. Rec. S5014 (daily ed. April 6, 1976) (remarks of Sen. Church) 16, 67

Pension Problems of Older Women, Hearings before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, 94th Cong., 1st Sess. (October 21, 1975) 16

PAGE

President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (April 1970) 22

Quadrennial Advisory Council on Social Security, reprinted in 1975 House Hearings, Financing the Social Security System 16, 66, 67, 69

Railroad Retirement System Report, H.R. Doc. No. 350, 92d Cong., 2d Sess. (1972) 44
Randolph, *Sex Discrimination in the Family Benefits Section of the Social Security Act*, 8 Clearinghouse Review 535 (December 1974) 28
Recommendations for Social Security Legislation, Report of the Advisory Council on Social Security to the Senate Finance Committee, S. Doc. No. 208, 80th Cong., 2d Sess. 6 (1949) 44
Riches, *Women Workers and Their Dependents Under the 1950 Amendments*, 14 Soc. Sec. Bull. 9 (1951) ..25, 26

S. Rep. No. 628, 74th Cong., 1st Sess. (1935) 44
S. Rep. No. 1669, 81st Cong., 2d Sess. (1950) 27
Social Science Research Council: Labor Force in the United States, 1890-1960 31
Story, J., Commentaries on the Constitution of the United States, Vol. 2, §§1938, 1939 (5th ed. 1891) 22

U.S. Commission on Civil Rights, Toward Elimination of Sex-Based Differentials in the Social Security System (December 1974) 17, 67
U.S. Dep't of Commerce, Bureau of the Census: Annual Report on the Labor Force, 1940-55 31

PAGE

U.S. Dep't of Commerce, Bureau of the Census, Current Population Reports, P-57, No. 94 and P-50, Nos. 22 and 32 33

U.S. Dep't of Commerce, Bureau of the Census, Current Population Reports, Special Studies, Series P-23 No. 58: A Statistical Portrait of Women in the United States (April 1976) 18, 39

U.S. Dep't of Labor, Bureau of Labor Statistics: Employment and Earnings, May 1960, 1965, 1970 and 1974 .....31, 33

U.S. Dep't of Labor, Bureau of Labor Statistics, Monthly Labor Review (April 1972) 30

U.S. Dep't of Labor, Bureau of Labor Statistics, Monthly Labor Review (November 1975) 33

U.S. Dep't of Labor, Bureau of Labor Statistics, Special Labor Force Report No. 14 33

U.S. Dep't of Labor, Bureau of Labor Statistics, Special Labor Force Report No. 130 34

U.S. Dep't of Labor, Employment Standards Administration, Women's Bureau, 1975 Handbook on Women Workers, Bulletin 297 .....17, 18, 27, 29, 30, 31, 32, 56

Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968) 40

Women and Social Security: Adapting to a New Era, A Working Paper prepared by the Task Force on Women and Social Security for use by the Special Committee on Aging, U.S. Sen. Committee Print, 94th Cong., 1st Sess. (1975) 43, 67, 68, 69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-699

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare,

Appellant,

—v.—

LEON GOLDFARB,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

Opinion Below

The opinion of the United States District Court for the Eastern District of New York is reported at 396 F. Supp. 308 (1975).

Jurisdiction

The judgment of the United States District Court for the Eastern District of New York, declaring portions of 42 U.S.C. §402 unconstitutional on the ground that they "deprive women of protection for their families which men receive as a result of their employment," was entered June

17, 1975. Notice of appeal to this Court was filed July 15, 1975. On the Solicitor General's application, the time for docketing this appeal was twice extended by order of Mr. Justice Marshall, first to October 13, 1975, then to November 12, 1975. The Jurisdictional Statement was filed November 12, 1975, Appellee's Motion to Affirm was filed December 10, 1975, and Appellant's Brief in Opposition to Motion to Affirm was filed January 16, 1976. Probable jurisdiction was noted February 23, 1976. Jurisdiction to review this decision on appeal is conferred by 28 U.S.C. §1252.

The Appendix and Brief for Appellant were due April 8, 1976. On the Solicitor General's April 7, 1976 letter application, and over the opposition of counsel for appellee, the filing time was extended to May 8, 1976. By letter dated May 7, 1976, the Solicitor General requested a further extension of Appendix and Brief filing time to May 22, 1976. This request, opposed by appellee, was denied May 10, 1976. On June 2, 1976, twenty-five days after expiration of the extended period, appellee received the Appendix and Appellant's Brief. Appellant has neither sought nor received this Court's leave for filing long out of time.

Question Presented

Whether 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D), which authorize social security benefits for a spouse on a male insured individual's earnings record without regard to dependency, but condition benefits for the spouse of a female insured individual on proof of dependency, discriminate invidiously on the basis of gender in violation of the fifth amendment to the Constitution.

Statute Involved

42 U.S.C. §402, in pertinent part, is set out in an addendum to this brief, *infra*, pp. 71-74.

Statement

This is a direct appeal from a final judgment of a three-judge district court declaring 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) unconstitutional insofar as these provisions discriminate against female individuals insured under social security and their spouses on the basis of sex. It is one of five appeals docketed in this Court by appellant, Secretary of Health, Education, and Welfare, involving substantially the same question: whether the stringent support test restricting old-age and survivors' benefits to a spouse on a female insured individual's earnings record, when no support test conditions benefits to a spouse on a male insured individual's earnings record, discriminates invidiously on the basis of gender in violation of the fifth amendment to the Constitution.[1] The instant appeal was the first docketed. The remaining appeals, in order of docketing, are: *Mathews* v. *Silbowitz,* No. 75-712, opinion below, 397 F. Supp. 862 (S.D. Fla. 1975); *Mathews* v. *Jablon,* No. 75-739, opinion below, 399 F. Supp. 118 (D. Md. 1975); *Mathews* v. *Coffin,* No. 75-791, opinion below, 400 F.

[1] This is an equal protection-gender discrimination issue. In this context, "[the] Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975).

Supp. 953 (D.D.C. 1975);[2] *Mathews* v. *Abbott,* No. 75-1643, opinion below, —— F. Supp. —— (N.D. Ohio, February 12, 1976). Each of the five district courts held the gender-explicit support test unconstitutional. Old-age (husband's insurance) benefits are at issue in *Silbowitz, Jablon* and *Abbott;* survivors' (widower's insurance) benefits are at issue in the instant case; both old-age and survivors' (husband's and widower's insurance) benefits are at issue in *Coffin.* The Secretary has indicated that if this Court affirms the decision below, he may withdraw the remaining appeals.[3]

Seventy year old Leon Goldfarb, a retired federal employee, applied for monthly social security survivors' (widower's insurance) benefits on the earnings record of his deceased wife, Hannah Goldfarb. Leon Goldfarb is not an insured individual under social security.[4] Hannah Goldfarb, a long-term public (municipal school system) employee, was covered by a municipal employees' pension (City of New York, Teachers' Retirement System) and was a fully in-

[2] In *Jablon* and *Coffin,* appeals have also been docketed by plaintiffs below. These appeals, Nos. 75-727 and 75-765, challenge the denial of demands by plaintiffs Jablon and Coffin for injunctive relief. They present the question:

> Whether 42 U.S.C. §405(g) prohibits the federal courts from enjoining the operation of a provision of the Social Security Act held to be unconstitutional.

[3] Jurisdictional Statement at 7, *Mathews* v. *Coffin,* No. 75-791.

[4] Universal social security coverage of gainfully-employed workers, including federal employees, has been identified as a vital objective. Financing the Social Security System, Hearings before the Subcommittee on Social Security, House Committee on Ways and Means, 94th Cong., 1st Sess. (May, June 1975) [hereinafter cited as 1975 House Hearings, Financing the Social Security System] 422-23 (Statement of Robert Myers, former chief actuary for the Social Security Administration); see *id.* at 150.

sured individual under social security.[5] Prior to her death in 1968, Hannah Goldfarb had contributed to social security pursuant to the Federal Insurance Contributions Act,[6] for some twenty-five years.

Leon Goldfarb's application for survivors' benefits was denied. A sole reason was supplied:

> You do not qualify for a widower's benefit because you do not meet one of the [statutory] requirements for such entitlement. This requirement is that you must have been receiving at least one half support from your wife when she died.

Appendix at 20. To qualify under the statutory "one-half support" formula, the applicant must claim and prove that his wife supplied all her own support and at least half of his, in other words, that her income was three times his.[7]

[5] Labelling pension plan and social security "alternative system[s]" (Brief for the Appellant at 8) is misleading. Receipt of a pension, whether from private or public employment, does not disqualify a covered worker, or his or her spouse, from collection of benefits under social security. Like Hannah Goldfarb, about two-thirds of the state and local employees in the country are insured under social security. See 1975 House Hearings, Financing the Social Security System 423; cf. *id.* at 150, 422-23 (substantial numbers of career federal employees supplement their civil service retirement income by qualifying as insured individuals under social security).

[6] See 1975 House Hearings, Financing the Social Security System 629, 632 (Statement of former Secretary of Health, Education, and Welfare Wilbur J. Cohen: F.I.C.A. title designation underscores the congressional view of the social security program's essential character, it is not a welfare system or simply "another form of tax," "it provides a form of monthly life insurance").

[7] As appellant acknowledges (Brief for the Appellant at 25 n. 14), it is not enough that the wife supply more than 50 percent of the couple's income. All her own support, one-half of his, is effectively a 3:1 or 75 percent marital unit support test. See

Such proof is required only when the insured individual is female. Benefits to a spouse on a male insured individual's earnings record are not conditioned upon a support test. It is undisputed that, had the gender of these spouses been reversed, all statutory requirements for benefit entitlement would have been met.

Summary of Argument

I.

42 U.S.C. §§402(b) and (e) authorize old-age and survivors' benefits for the spouse of a male insured individual whatever the ratio of husband/wife contributions to family expenses. 42 U.S.C. §§402(c) and (f) authorize old-age and survivors' benefits for the spouse of a female insured individual only when wife's contributions to family expenses are three times as large as husband's. This differential, based on gender as such, reflects the familiar stereotype that, throughout the Nation's history, has operated to devalue women's efforts in the economic sector.

The §402 classification, coinciding "with the role-typing society has long imposed," does not fairly and substantially advance legitimate governmental ends. Were Leon Goldfarb the insured individual and Hannah Goldfarb the retired worker not covered by social security on her own

---

Motion to Affirm at 4a, *Mathews* v. *Jablon*, No. 75-739, and *Mathews* v. *Coffin*, No. 75-791; cf. *id.* at 2a (female insured individual Edna Coffin and spouse Edgar Coffin were approximately equal earners, her public employees' pension was slightly larger than his). See also *Frontiero* v. *Richardson*, 411 U.S. 677, 680 n.4 (1973) (substantially identical gender line declared unconstitutional); *Clark* v. *Celebrezze*, 230 F. Supp. 798 (D. Mass. 1974), *aff'd*, 344 F.2d 479 (1st Cir. 1965) (indicating the severe impact of the §402 gender line on the most sorely pressed two-earner families).

account, both members of the family unit would qualify for social security benefits in addition to their civil service pensions. Since the insured individual in this case is female, although her contributions to social security were made on the same basis as a male worker's, the marital unit receives fewer benefits.

The statutory scheme thus favors one type of marital unit over another. In the favored unit, husband's employment attracts secondary benefits as a matter of right without regard to wife's dependency. In the disfavored unit, wife's employment generates the same benefits only if she furnishes at least three-fourths of the unit's support. This scheme, which places gainfully-employed women on a par with gainfully-employed men for social security contribution purposes, but subordinates women to men for the purpose of determining secondary benefits due under an insured individual's account, discriminates invidiously: "it provides the family of a female wage earner less protection than it provides the family of a male wage earner, even though the family needs may be identical."

II.

The familiar and once pervasive legislative assumption reflected in 42 U.S.C. §402, that women depend on men but not vice versa, never matched reality, and is today further than ever from the truth. Women have participated in vital family income production activity in substantial numbers throughout the decades in which family coverage has been a feature of social security. Increase in women's work force participation rates during these decades has been marked among women now at retirement age.

The 42 U.S.C. §402 gender classification ignores the fact of family economic interdependence and is unconcerned with the woman worker, her status, her role and interest in insuring family security. Rather, the scheme underestimates women's contributions to family support, overestimates men's, and places an official imprimatur on categorization of women as second-class workers. By rewarding men's employment more than women's, the arrangement has all the earmarks of self-fulfilling prophecy: it impedes removal of artificial barriers to recognition of women's full, human potential, and retards society's progress toward equal opportunity, free from gender-based discrimination.

III.

The 42 U.S.C. §402 discrimination against families that include a female in covered employment cannot be rationalized as part of a "compensatory" or "remedial" plan. Rather, the scheme "heaps on" an additional disadvantage, exacerbating, not alleviating, past discrimination encountered by women in the labor market. Three times in as many years this Court has been invited to label "benign" a classification that instructs the gainfully-employed female: your earnings, solely on the basis of your sex, are less valuable to your spouse and family than the earnings of a similarly positioned male. That invitation to dissemble, declined in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), and *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975), warrants firm rejection in the case at bar.

IV.

As in *Frontiero,* the Government in the instant case has not and could not offer "concrete evidence" that presuming women dependent "in fact saves the Government any money." Beyond question, the 42 U.S.C. §402 3:1 dependency test, were it applied across the board, would disqualify a substantial population of women. Since many millions of married women earn enough to cover at least half their own living expenses, the one-way dependency test cannot be justified as a reasonable, economy-minded substitute for functional, sex-neutral classification.

Nor can the derivative benefits here at issue be brushed aside by labelling them a "windfall." The §402 differential underscores for the woman her subordinate status as a gainfully-employed individual. This reality is not disguised by telling her that "windfalls" are reserved for those who claim under the account of a man.

V.

Administrative or fiscal policy considerations do not justify resort to gender pigeonholing in lieu of functional description where the effect of the categorization is to denigrate the efforts of women "whose earnings contribute significantly to their families' support." Congress has on its agenda adjustments needed to alleviate immediate strains on the social security program and to tailor the system to demographic changes and projections for the decades ahead. But no participant in the legislative debate over revision of the social security system has advocated retention of gender classifications as a rational or realistic means to help hold the line, even for the shortest term. On

the contrary, proposals relevant to this issue are in notable accord: any benefit available to a male insured individual's spouse should be made available, on the very same basis, to a female insured individual's spouse.

VI.

Benefits distributed by the federal government to gainfully-employed individuals and their families must be allocated with an even hand and without resort to gross gender classification. Decisions of this Court establish that the importance of a woman's work force participation may not be discounted in employment-related regulation.

As underscored by multiple federal efforts to counter practices that deny women equal rights and opportunities in the labor market, conspicuously including appellant's own published guidelines, the 42 U.S.C. §402 gender-based differential is wedded to an old and misguided paternalistic notion at odds with national antidiscrimination policy. Congress and every concerned federal agency has identified as invidious discrimination against gainfully-employed women provision of benefits for wives or widows of male workers when the same benefits are not made available on the same terms to the husbands or widowers of female workers. These federal directives reflect that in an egalitarian union, man depends on woman fully as much as woman depends on man.

VII.

Upon determining that the gender line drawn by 42 U.S.C. §402 is unconstitutional, the Court, consistent with the dominant congressional purpose, should declare the social insurance benefits in question equally applicable to men and women. The remedial issue in this case involves

tentative adjudication, not definitive disposition by this Court. Ultimate authority to eliminate or reshape social security spousal benefits remains with Congress. Consonant with the pattern unexceptionally followed by Congress in recent years, the legislature would extend the same benefits to the spouses of male and female insured individuals "without subjecting them to the humiliation" of a dependency test.

A cross-the-board dependency test would be inconsistent with the basic design of social security as an "earned right," not a public assistance, need-determined welfare program. Moreover, extension of the support requirement would impose an administrative burden of potentially monstrous proportion. Finally, since similarly circumstanced spouses of male wage earners have been accorded the benefits in question, the denial of equal protection to appellee Goldfarb can be repaired only by according him benefits from the date of his application. Neither application of a dependency test cross-the-board nor elimination of survivors' benefits forms any part of the "case or controversy" Leon Goldfarb's complaint presents. Under the circumstances, declaration of the invalidity of the 42 U.S.C. §§402 (c)(1)(C) and (f)(1)(D) one-way, one-half support stipulation is the only appropriate judicial remedy.

ARGUMENT

I.

The gender-based criterion established by 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) discriminates invidiously against gainfully-employed women insured under social security as well as against their surviving spouses.

A. *The statute discriminates against gainfully-employed women insured under social security.*

> [T]he Constitution . . . forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men. *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 645 (1975).

Under 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D), a female wage earner's social security contributions attract old-age and survivors' benefits for her spouse only if the wage earner supported herself and supplied "at least one-half" of her husband's support. By contrast, no support test restricts old-age and survivors' benefits due to a spouse under a male wage earner's account. 42 U.S.C. §§402(b), (e). This discrimination, based on gender as such, cannot be distinguished on any principled ground from the differentials declared unconstitutional in *Wiesenfeld, supra,* and *Frontiero* v. *Richardson,* 411 U.S. 677 (1973).

Like the dependency test for male but not female military spouses invalidated in Sharron and Joseph Frontiero's

case,[8] the virtually identical test in the case at bar "deprive[s] women of protection for their families which men receive as a result of their employment." *Wiesenfeld,* 420 U.S. at 645. The work-related equal benefits principle confirmed in *Frontiero* plainly applies to social insurance due under a wage earner's account. As this Court explained in *Wiesenfeld,* 420 U.S. at 646-47:

> We do not see how the fact that social security benefits are "noncontractual" can sanction differential protection for covered employees which is solely gender based . . . . [T]he statutory right to benefits *is* directly related to years worked and amount earned by a covered employee, and not to the need of the beneficiaries directly.

Boldly underscoring the point, the Department of Health, Education, and Welfare consistently emphasizes in public pronouncements "the earned-right, earnings-related principles behind the social security program":

> Social security is *purchased insurance* for retirement, and not welfare. (Emphasis supplied.)

Statement of Hon. Caspar Weinberger, then Secretary of Health, Education, and Welfare, in 1975 House Hearings, Financing the Social Security System 436, 440, 441. See

---

[8] Under the statutory schemes held to deny equal protection in *Frontiero,* Sharron Frontiero received housing, medical and dental benefits for herself, without regard to her marriage, just as Hannah Goldfarb qualified for social security coverage for herself, without regard to her marriage. Pursuant to this Court's judgment in *Frontiero,* medical and dental benefits accrued directly to Joseph, and Sharron received for herself and Joseph the married members housing allowance.

also *id.* at 627, 629, 632 (Statement of Wilbur J. Cohen, former Secretary of Health, Education, and Welfare, sharply distinguishing social security insurance contributions from general revenue taxation, and social security insurance payments from public assistance, need-determined welfare payments).[9]

Like the §402(g) mother's benefit declared applicable to fathers as well in *Wiesenfeld,* the gender line in the instant case denies the female worker protection for her spouse which a similarly situated male worker receives. As Mr. Justice Powell, writing for himself and Mr. Chief Justice Burger, clarified, *Wiesenfeld* is not properly explained as a parental "child care" case, for the "payment of benefits is not conditioned on the surviving parent's decision to remain at home." 420 U.S. at 654. Rather, the critical point made by Mr. Justice Powell with respect to Paula Wiesenfeld applies with equal force to Hannah Goldfarb:

> The statutory scheme . . . impermissibly discriminates against a female wage earner because it provides her family less protection than it provides the family of a male wage earner, even though the family needs may be identical.

[9] Throughout the Hearings, government representatives and advisers, as well as House members, identified three dominant themes in the social security program: earned right to benefits, wage-related contributions, and absence of means testing. See, *e.g., id.* at 113-14, 510, 519, 656, 678, 682, 686. The "earned-right principle" basic to the social security system has been stressed most recently by the current Secretary of Health, Education, and Welfare, F. David Mathews. See New York Times, March 7, 1976, Section 4, p. 3, col. 2.

420 U.S. at 654-55.[10] Hannah Goldfarb, like Paula Wiesenfeld, was treated on a par with men for social security contribution purposes, but as subordinate to men for the purpose of determining secondary benefits due under her account. See *Wiesenfeld,* 420 U.S. at 645.

As the court below pointedly observed, 396 F. Supp. at 309:

> Whatever may have been the ratio of contributions to family expenses of the Goldfarbs while they both worked, Mrs. Goldfarb was entitled to the dignity of knowing that her social security tax would contribute to their joint welfare when the couple . . . retired and to her husband's welfare should she predecease him. She paid taxes at the same rate as men and there is not the slightest scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men. The government has failed to justify this gender-based discrimination.

The same assessment has been made in every reasoned discussion of the §§402(c)(1)(C) and (f)(1)(D) gender line. Four federal district courts in addition to the court below have rendered final judgments holding that the differential operates invidiously against the gainfully-employed married woman. *Silbowitz* v. *Secretary of Health, Education,*

[10] Pressed to devalue the path-marking decisions in *Frontiero* and *Wiesenfeld,* appellant dismisses the Court's principal focus on the wage-earning woman as "merely rhetorical." Brief for the Appellant at 13 n. 2. This devaluation conflicts head-on with the Solicitor General's own principled declaration. See text following note 19 *infra.* For thoughtful description of the significance of the *Frontiero* and *Wiesenfeld* precedents, see Note, 89 Harv. L. Rev. 95 (1975).

and Welfare, 397 F. Supp. 862 (S.D. Fla. 1975) (husband's insurance benefits); *Jablon* v. *Secretary of Health, Education, and Welfare*, 399 F. Supp. 118 (D. Md. 1975) (widower's insurance benefits); *Coffin* v. *Secretary of Health, Education, and Welfare*, 400 F. Supp. 953 (D.D.C. 1975) (husband's and widower's insurance benefits); *Abbott* v. *Weinberger*, —— F. Supp. —— (N.D. Ohio, February 12, 1976) (husband's insurance benefits).[11] Indeed, appellant's predecessor and the Solicitor General have acknowledged before this Court that the sex differentials involved in *Frontiero* and *Wiesenfeld* are "very closely analogous"[12] to, and reflect the same congressional assumption[13] as the differential

[11] No court confronted with the issue has upheld the gender line. Cf. *Bowen* v. *Hackett*, 361 F. Supp. 854, 861 (D.R.I. 1973) (*Reed* and *Frontiero* require rejection of a statutory presumption, drawn for social insurance purposes, that father provides the main support of minor child).

[12] Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld*.

[13] Brief for the Appellees at 8, *Frontiero* v. *Richardson*. That assumption, woman's dependence/man's independence, is in fact the basis of social security's family insurance scheme. See pp. 25-29 *infra*. The assumption has been condemned in every analysis focused on genuine needs and interests of married female workers. See, *e.g.*, 1975 Hearings, Financing the Social Security System 204 (recommendation of the Quadrennial Advisory Council on Social Security to eliminate one-half support test for husband's and widower's benefits: "for any category of women entitled to secondary benefits the corresponding category of men should be entitled to benefits on the same basis"), 399 (former chief actuary, Social Security Administration recommendation for immediate elimination of the §402 husband's and widower's benefit one-half support requirement, for if Congress does not "grab the ball . . . and run with it . . . [s]urely, the courts will at some time in the near future make this change"); 122 Cong. Rec. S5014 (daily ed. April 6, 1976) (remarks of Sen. Church, Chairman, Senate Committee on Aging); Pension Problems of Older Women, Hearings before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, 94th Cong., 1st Sess. 43-46, 55 (October 21, 1975); Income Security for Older Women: Path to Equality, Report by the Subcommittee on

at issue here. Rebuffed by the Court's firm response to earlier essays, appellant now deals with the disadvantage the scheme imposes on the wage-earning woman by ignoring it. See Brief for the Appellant at 36.

In sum, the overt, lump gender classification in question devalues the woman's efforts in the job market by marking her as an individual whose participation in the paid labor force is subordinate to that of the family's man.[14] Consistent with this Court's precedent from *Reed* v. *Reed*, 404 U.S. 71 (1971), through *Stanton* v. *Stanton*, 421 U.S. 7 (1975), the gender line must be regarded as an impermissible means to determine benefits due on the earnings record of an individual insured under social security.

Retirement Income and Employment of the House Select Committee on Aging, 94th Cong., 1st Sess. 2, 34 (December 1975); U. S. Department of Labor, Employment Standards Administration, Women's Bureau, 1975 Handbook on Women Workers, Bulletin 297 [hereinafter cited as 1975 Handbook on Women Workers] 303-307, 308 n. 7, 312; Citizens' Advisory Council on the Status of Women, Women in 1975, at 13, 121 (March 1976) ("benefits for husbands and widowers should be provided without a support test as are benefits for wives and widows"); U. S. Commission on Civil Rights, Toward Elimination of Sex-Based Differentials in the Social Security System 7-10, 39 (December 1974) ("There can be no more invidious form of sex discrimination" than the overt gender classifications remaining in the Social Security Act.).

[14] Economists have noted the adverse, unfair impact on women and "deadweight loss to society" yielded by government policy based on the notion that females are properly treated as subordinate breadwinners. Boskin, The Effects of Government Expenditures and Taxes on Female Labor, 64 Am. Economic Rev. 251, 255-56 (1974); 1975 House Hearings, Financing the Social Security System 388 (statement of Harvard economist Martin Felstein). See generally Economic Independence for Women (Chapman ed. 1976) (especially articles by Griffiths at 23 and Bell at 239).

B. *The statute discriminates against surviving spouses of female workers insured under social security.*

Solely on account of his sex, Leon Goldfarb is disqualified by statute from receiving social security benefits. Identically situated spouses, like identically situated insured wage earners, are treated differently under 42 U.S.C.§§402 (b), (c)(1)(C), (e), (f)(1)(D) solely on the basis of gender. A double-edged discrimination is inherent in the §402 classification. See *Wiesenfeld,* 420 U.S. at 651-52 (explicitly acknowledging that the sex-based classification had a negative impact on men as well as on gainfully-employed women); Note, 89 Harv. L. Rev. 95, 99 n.38 (1975). Identically situated persons are accorded different treatment by reason of a characteristic over which they have no control, and which bears no necessary relationship to their abilities, needs, or functions. No woman in appellee's situation can be denied the benefits in question; no man so situated can obtain them.[15] No female wage earner can obtain through her social security contributions the coverage for her spouse as of right and regardless of his dependency, guaranteed to the spouse of every male wage earner. Like Stephen Wiesenfeld and Joseph Frontiero, Leon Goldfarb properly invokes the equal protection principle to establish his right to even-handed treatment, to receipt of social security benefits computed, without regard to gender,[16] on the basis of the contribution record of his wage-earning spouse.

[15] See *Jablon* v. *Secretary of Health, Education, and Welfare,* 399 F. Supp. at 130. Beyond question, the §402 3:1 dependency test, were it applied across the board, would disqualify a substantial population of women. See, *e.g.*, 1975 Handbook on Women Workers 5, 115, 139 (in 1973, married women working full-time year round contributed nearly 2/5 of family income; that year, women accounted for 34% of all federal white-collar workers). See also U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Special Studies, Series P-23 No. 58: A Statistical Portrait of Women in the United States 52 (Table 10-10) (April 1976). Appellant's claim that a cross-the-board dependency test would disqualify only "a small percentage of non-dependent women" (Brief for the Appellant at 35) is contradicted by the very facts appellant presents. The 27% median contribution of the wife (including those who work part-time) to total family income (see Brief for the Appellant at 34) would disqualify her under the one-half support test. See note 7 *supra.*

II.

Employment of a gender-based criterion as a means to determine benefits due on the earnings record of an individual insured under social security constitutes a denial of the equal protection of the laws guaranteed by the due process clause of the fifth amendment.

To survive constitutional review, gender-based classifications, at a minimum, must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed, supra,* 404 U.S. at 76, quoting from *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). Post-*Reed* precedent, guided by the Court's unanimous turning-point decision, responds more elaboratively to the root cause of law-sanctioned gender lines that

[16] Appellant's heavy reliance on *Weinberger* v. *Salfi,* 422 U.S. 749 (1975) (Jurisdictional Statement 4-5, Brief for the Appellant at 6, 14, 32) is as misplaced as is his offhand dismissal of *Wiesenfeld, supra,* as failing to provide "useful instruction." Brief for the Appellant at 14. No obvious and immutable badge of identification figured in *Salfi.* Cf. *Mathews* v. *Lucas,* —— U.S. —— (June 29, 1976) (Slip Opinion at 10, 17). Nor does "due process/conclusive presumption" analysis, the doctrine reexamined in *Salfi,* have any bearing on the instant case, which involves "discrimination based on gender as such." See *Geduldig* v. *Aiello,* 417 U.S. 484, 496 n. 20 (1974).

impact adversely upon women who seek to pursue economic or political activity on the same basis as men. See especially *Frontiero, Wiesenfeld,* and *Stanton* v. *Stanton, supra.* It is appellee's position that the 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) one-half support test for male but not female spouses does not fairly and substantially advance legitimate governmental ends.[17] *A fortiori,* the test does not meet the heightened review standard implicit in the Court's post-*Reed* decisions.

Alert to the impossibility of justifying this gender line absent the Court's willingness to adopt "anything goes" as the appropriate test, appellant tenders a revisionist version of the current decade's precedent. Brief for the Appellant at 9-14. *Reed* is written off as a case "not based upon special considerations relating to sexual classifications." *Id.* at 11. Assuming appellant's "close study" (*id.* at 9) extended to Shepard's Citations and the Index to Legal Periodicals, he is surely acquainted with the virtually unanimous view of lower courts and commentators: "Only by importing some special suspicion of sex-related means . . . can the [*Reed*] result be made entirely persuasive." Gunther, In Search of Evolving Doctrine on a

[17] *Reed* established that a "legitimate" legislative objective does not suffice to justify resort to a gender-based criterion. See 404 U.S. at 76 (legislative objective, reducing probate court workloads, did not lack legitimacy); Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 36 (1972). In *Frontiero, supra,* and *Wiesenfeld, supra,* the legislative means, gross gender classification, not the legislative objective, provision of benefits to the family or spouse of a gainfully-employed individual, rendered the statutory arrangements infirm. See also *Taylor* v. *Louisiana,* 419 U.S. 522, at 538 (1975) (although the special sex-based exemption is impermissible, the legislature remains free to prescribe relevant qualifications for jurors and to provide reasonable exemptions).

Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972); *Wood* v. *Mills,* 528 F.2d 321, 324 (4th Cir. 1975) (*Reed* teaches that sex-based classifications require "strong justification").

Equally anomalous, and irreconcilable with a pretension to "close study," is appellant's assertion that the Court has "explicitly rejected" inclusion of sex among the suspect categories. Brief for the Appellant at 10. As even cursory review of *Stanton* v. *Stanton, supra,* reveals, that issue remains open: to date, the Court has found it "unnecessary . . . to decide whether a classification based on sex is inherently suspect." 421 U.S. at 13.[18]

Since appellant's presentation ultimately rests on this Court's readiness to treat the gross gender classification before it with the utmost indulgence (Brief for the Appel-

[18] Briefs in *Reed* and *Frontiero* discuss in detail the prime generator of gender-based classifications in the law: the notion that social roles are ordained by sex, that woman's primary occupation is (or should be) wife and mother, man's, work in the world outside the home. Brief for Appellant, *Reed* v. *Reed, supra;* Jurisdictional Statement, Brief of American Civil Liberties Union, Amicus Curiae, and Joint Reply Brief of Appellants and American Civil Liberties Union, *Frontiero* v. *Richardson, supra* (lingering attachment to the notion of woman's place in man's world has caused perpetuation of lump treatment by sex in the face of forthright recognition that such en masse categorization is fundamentally unfair where race or national origin is the birth characteristic in question). Cf. *Mathews* v. *Lucas,* —— U.S. —— (June 29, 1976) (Slip Opinion at 10, 17); Note, 89 Harv. L. Rev. 95 (1975).

Since the differential here at issue works an invidious discrimination of the precise kind and quality at issue in *Frontiero* and *Wiesenfeld,* the decision below can be affirmed on the authority of those precedents. The course appellant urges this Court to follow, on the other hand, would necessitate a definitive ruling that sex has no place among the suspect categories.

lant at 14-15, 30, 32),[19] it is appropriate to recall the Solicitor General's own appraisal of *Reed* and *Frontiero* some two and a half years ago:

> It is now settled that the Equal Protection Clause of the Fourteenth Amendment (like the Due Process Clause of the Fifth) does not tolerate discrimination on the basis of sex. *Reed* v. *Reed,* 404 U.S. 71; *Frontiero* v. *Richardson,* 411 U.S. 677.

Memorandum for the United States as Amicus Curiae (Robert H. Bork, Solicitor General) at 8, *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974).

[19] Overwhelming congressional approval of the equal rights amendment surely was not intended to deter dynamic judicial interpretation of the fifth and fourteenth amendments to bar law-sanctioned sex discrimination. During debate on the amendment, the principal proponent in the House, Representative Martha Griffiths, declared:

> There never was a time when decisions of the Supreme Court [under the fifth and fourteenth amendments] could not have done everything we ask today. 116 Cong. Rec. 28005 (1970).

Nonetheless, she urged her colleagues to provide a further constitutional guarantee of equality of rights and responsibilities between the sexes so that there would not be the slightest doubt that men and women stand as equals before the law. Cf. 2 J. Story, Commentaries on the Constitution of the United States §§1938, 1939 (5th ed. 1891). See also Citizens' Advisory Council on the Status of Women, A Memorandum on the Proposed Equal Rights Amendment to the United States Constitution 9-10 (1970), reprinted in Hearings on S.J. Res. 61 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. at 381-82 (1970); President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice 4 (April 1970); Equal Rights for Men and Women, S. Rep. 92-689, 92d Cong., 2d Sess. 10 (1972).

A. *The 42 U.S.C. §§402(b), (c)(1)(C), (e), (f)(1)(D) gender line favors marital units with a male insured individual over units with a female insured individual; this favoritism does not fairly and substantially advance legitimate governmental ends.*

Were Leon Goldfarb the municipal pensioned employee insured under social security, and Hannah Goldfarb the federal employee not covered by social security on her own account, both members of the family unit would qualify for social security benefits in addition to their civil service pensions. Since the insured individual in this case is female, although her contributions to social security were the same as a male wage earner's, the marital unit receives fewer benefits. In other words, the statutory scheme here, just as the schemes in *Frontiero*[20] and *Wiesenfeld,*[21] favors one type of marital unit over another. And the basis for distinction is that in the favored unit, husband's employment attracts the old-age or survivors' benefit. His employment generates secondary benefits as of right without regard to his wife's dependency; her employment generates those same benefits only if she outearns her husband 3:1.

The pernicious impact of distinctions so grounded has become apparent: they intrude on private decision-making in an area in which the law should maintain strict neu-

[20] In defending the *Frontiero* classification before this Court in 1972-73, the Solicitor General noted that similar distinctions are found in other federal legislation. He supplied only one example: the very social security differential at issue in the case at bar. Brief for the Appellees at 8, *Frontiero* v. *Richardson.*

[21] In 1974-75, when the exigencies of this case did not determine his course, the Solicitor General maintained that the line drawn in *Wiesenfeld* and the one in question here are "very closely analogous." Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld.*

trality.[22] For when a statute assumes gainful employment as a domain in which men come first, women second, the effect is to promote the traditional division of labor between men and women, to impede removal of artificial barriers to recognition of women's full, human potential, and to retard society's progress toward equal opportunity, free from gender-based discrimination.[23] Laws of this genre, statutes that make convenient assumptions about "the way women (or men) are," were found constitutionally infirm in *Reed, Frontiero, Wiesenfeld* and *Stanton.* See also *Taylor* v. *Louisiana, supra.* On any reasoned analysis, those precedents must control the case at bar. See Note, 89 Harv. L. Rev. 95 (1975).

[22] See *Stanton* v. *Stanton, supra*, 421 U.S. at 15 (emphasizing the "self-serving" quality of distinctions that "coincide with the role-typing society has long imposed"); Note, 89 Harv. L. Rev. 95, at 100-103 (1975) ("[L]egislative interference with an individual's choice of social roles, rather than a concern about stigma . . . should guide analysis of the stereotyping effects of gender-specific classifications.").

[23] See note 14 *supra*. The Social Security Administration has acknowledged this effect in at least two publications: Hoskins & Bixby, Social Security Administration Research Report No. 42, Women and Social Security: Law and Policy in Five Countries 94-95 (1973); Bixby, Women and Social Security in the United States, 35 Soc. Sec. Bull. 3, 7 (1972).

As to the insidious consequences of the paternalistic assumption that women depend on men, but not vice versa, see *Vuyanich* v. *Republic Nat'l Bank*, 409 F. Supp. 1083, 1089 (N.D. Tex. 1976) (supervisor's alleged statement that employee probably did not need a job because her husband was a Caucasian "smacks of sexual as well as racial discrimination").

B. *The legislative presumption underlying the §402 differential, that women depend on men but not vice versa, is today further than ever from the truth and in fact never matched reality.*

When the Federal social security program was introduced in 1935, monthly benefits were provided for workers only, not for their families. Social Security Act of August 14, 1935, ch. 531, §202, 49 Stat. 623. In 1939, the Social Security Act was amended to provide family coverage; this coverage was expressly limited to wives, widows, children and dependent parents. Social Security Amendments of August 10, 1939, ch. 666, §§201, 202, 53 Stat. 1362-66. To avoid detailed investigations into family financial relationships, no dependency-in-fact test was imposed with respect to wife, widow or minor child. See Hoskins & Bixby, Social Security Administration Research Report No. 42, Women and Social Security: Law and Policy in Five Countries 77 (1973); Note, 49 Ind. L. J. 181, 185 (1973).

In an effort to reshape the congressional construct, appellant asserts that in 1939, Congress presumed a married woman's "social welfare need," not her "dependency." Brief for the Appellant at 18, 22 n.11, 23, 36. Again, this is revisionist interpretation. As the legislative history reflects, and as the Social Security Administration candidly publicized: "in setting up the insurance program, [Congress] considered first the traditional family, in which the man worked to support his wife and children." Riches, Women Workers and Their Dependents Under the 1950 Amendments, 14 Soc. Sec. Bull. 9 (1951).[24]

[24] Indeed, had Congress focused on a woman's "social welfare need" rather than on her dependence upon a man, the class divorced women might have attracted first attention. Many of

Extensive amendments to the Social Security Act were made in 1950. One of the alterations[25] was viewed as establishing parity between married male and female workers. As a program analyst for the Social Security Administration explained:

> The earlier [1939] legislation made no provision for benefits to a husband or widower on a woman's wage record. . . .
>
> The 1950 amendments have resolved this inequity.

Riches, *supra*, 14 Soc. Sec. Bull. at 11. The "resolution" effected in 1950 remain force. It continued benefits for wives and widows as of right without regard to dependency, and added benefits for husbands and widowers, but

these women are needy, but very few of them are supported by their former husbands, and none of them qualify for a forced share in the former husband's estate. See Jacobson, American Marriage and Divorce 126 (1959) (in 1922, the last year the Census Bureau kept national alimony data, alimony was decreed in only 15% of a nationwide sample of decrees); Bryant, Evans & Powell, American Women in International Women's Year 41, 43 (Market Opinion Research 1975) (recent, nationally-representative survey revealed that only 14% of divorced or separated mothers had been awarded alimony or maintenance payments and less than half of those with awards received payments regularly); Citizens' Advisory Council on the Status of Women, Women in 1971, Appendix C (1972); Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171, 187-92 (1971) (most divorcees and separated wives are awarded no or scant alimony). Yet Congress provided no coverage at all for divorced wives until 1965. P.L. 89-97, §308, 79 Stat. 375, amending 42 U.S.C. §§402, 415 (eligibility conditioned on marriage to insured for at least 20 years and satisfaction of the one-half support test); P.L. 92-603, 86 Stat. 1335 (1972) (eliminating one-half support test).

[25] Social Security Amendments of August 28, 1950, ch. 809, §101(a), 64 Stat. 483, 485 (codified at 42 U.S.C. §§402(c), (f)).

conditioned those benefits upon satisfaction of a stringent dependency test. To qualify for benefits on a woman's wage record, a husband or widower must have received at least one-half of his *individual* support from his wife. To determine husband's or widower's eligibility, total family income available for the couple's expenses is computed; half that amount is deemed husband's *total* support; half again is deducted, yielding a qualifying husband's ceiling contribution to the unit's support. In other words, wife must have paid at least three-fourths of the total family expenses for husband to qualify under her account. See *Clark* v. *Celebrezze*, 230 F. Supp. 798 (D. Mass. 1964), *aff'd*, 344 F.2d 479 (1st Cir. 1965) (where wife contributed $3624 to the couple's expenses, and husband $1344, husband does not qualify for benefits under wife's account).[26]

Legislative materials produced at the time of the 1950 amendments do not advert to the differential created by the one-way support test. The sole reference to the test made by the Senate drafters concerned the Administrator's regulatory authority to insure appropriate treatment of "income attributable to a spouse under community property laws." S. Rep. No. 1669, 81st Cong., 2d Sess. 63 (1950). However, the congressional perspective is not obscure. As a recent comment puts it:

> Congress has consistently used the "traditional" family structure (male/breadwinner and female/depen-

[26] No credit is given for the support contributed by services in the home. See 1975 Handbook on Women Workers 174-75 (Tables 75 and 76) (For two-earner couples in the 40-54 age range, the average annual dollar value of time contributed by the working wife in household services is $3200, and by the working husband, $600. For the 55 and over population, wife's contribution remains $3200, husband's increases to $900.).

dent) as the model for the development of family benefits. Consequently, it is not surprising that many provisions directly discriminate against families which include a female in covered employment.

Randolph, Sex Discrimination in the Family Benefits Section of the Social Security Act, 8 Clearinghouse Review 535 (December 1974). Describing the legislative myopia more dramatically, (then) Congresswoman Martha Griffiths said:

> The income security programs of this nation were designed for a land of male and female stereotypes, a land where all men were breadwinners and all women were wives or widows; where men provided necessary income for their families but women did not; in other words, where all of the men supported all of the women. This view of the world never matched reality, but today it is further than ever from the truth.

Griffiths, Sex Discrimination in Income Security Programs, 49 Notre Dame Lawyer 534 (1974). Indeed, even as to children's benefits, the stereotype controlled. Initially, a mother's work provided benefits for her child only if mother was the child's sole supporter *and* father was not living with the child. Social Security Amendments of August 10, 1939, ch. 666, §202(c), 53 Stat. 1364. Partial alteration was effected in 1950. Social Security Amendments of August 28, 1950, ch. 809, §101(a), 64 Stat. 484. However, full equalization of benefits available to the children of working women was not accomplished until 1967. Social Security Amendments of January 2, 1968, P.L. No. 90-248, §151, 81 Stat. 860, amending 42 U.S.C. §402(d).

In short, if any "factual basis" informed the congressional judgment in 1950, it is nowhere revealed in the legislative history of that year's social security amendments. Nor could it be. For the arrogant legislative presumption that women depend on men, but not vice versa[27] is today "further than ever from the truth," and in fact "never matched reality." Women's work force participation continues to increase, but women have participated in the labor market in substantial numbers, constituting over 25% of all workers, throughout the period in question. See 1975 Handbook on Women Workers 11. Further, the facts as to participation rates by age contradict appellant's speculation (Brief in Opposition at 4 n.3) regarding the character of "the present generation of retirement-age women." For the sharp jump in work force participation rates between 1940 and 1960 occurred among women 45 to 54, the very women now at retirement age. See 1975 Handbook on Women Workers 12.

In stark contrast to the familiar assumption, the dual-earner family represents and is destined to remain "the typical American pattern." Bell, Working Wives and Family Income, in Economic Independence for Women

---

[27] Among ramifications of this facile presumption are the credit problems faced by women to which Congress has recently responded. See Equal Credit Opportunity Act of 1975, P.L. 93-495, 88 Stat. 1521, as amended by P.L. 94-239, 94th Cong., H.R. 6516 (March 23, 1976); Chapman, Sex Discrimination in Credit: The Backlash of Economic Dependency, in Economic Independence for Women 263 (Chapman ed. 1976).

Here too, it bears emphasis that the "social welfare need" label to cover Congress' independent male/dependent female assumption is appellant's very recent invention. Compare Brief for the Appellant at 24, 28, with Brief for the Appellees at 8-10 *Frontiero* v. *Richardson*, *supra* (the classification "obviously reflects the congressional judgment that most wives are dependent on their husbands"), and Note, 49 Ind. L.J. 181, 185-86 (1973).

239, 254, 258 (Chapman ed. 1976). By 1973, in more than half the nation's husband-wife families, the wife had earnings. 1975 Handbook on Women Workers 53-54, 138. Over 42% of gainfully-employed married women living with their husbands worked year round at full-time jobs. *Id.* at 53-54. These women supplied approximately two-fifths of family income. *Id.* at 5, 139. Moreover, the median proportion of family income contributed by working wives in 1970, including wives who worked part-time, was 27%. This overall relative contribution of working wives to family income, 27%,[28] was about the same in 1970 as it had been for at least a decade. U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review 8 (April 1972). The 27% contribution, let alone the full-time working wife's 39% contribution, would exclude a determination of dependency-in-fact under the §402 self-support test. See *Clark* v. *Celebrezze, supra;* cf. *Frontiero, supra,* 411 U.S. at 689.

In *Taylor* v. *Louisiana, supra,* 419 U.S. at 535 n.17, this Court noted that by "October 1974, 54.2% of all women between 18 and 64 years of age were in the labor force." The situation acknowledged by the Court in *Taylor* is the result of steady growth, not precipitous change. If the notion that it is natural for man to be breadwinner, women to be dependent, had been less deeply ingrained, Congress might have noticed in 1939 and in 1950 that gainfully-employed women constituted a significant part of the work force. The reality concerning the employment of women 16 years of age and over, as presented for the relevant

[28] If support contributed by services in the home counted in the computation, the working wife's percentage would be considerably higher. See note 26 *supra.*

period in 1975 Handbook on Women Workers 11 (Table 2),[29] is set out below:

WOMEN IN THE LABOR FORCE, SELECTED YEARS, 1940-74
(Women 16 years of age and over)

Date	Number (in thousands)	As percent of all workers	As percent of woman population
Highlights*			
April 1974	35,165	39.3	45.0
April 1970	31,293	38.1	43.2
Midsixties (April 1965)	25,831	35.0	38.8
Start of the sixties (April 1960)	22,985	33.3	37.4
Midfifties (April 1955)	19,987	31.2	34.8
Korean War (April 1953)	19,116	30.6	34.0
Pre-Korean War (April 1950)	17,882	29.1	33.0
Post-World War II (April 1947)	16,150	27.6	30.9
World War II (April 1945)	19,290	36.1	38.1
Pre-World War II (March 1940)	13,783	25.4	28.9

* Civilian labor force.

Source: U.S. Department of Labor, Bureau of Labor Statistics: Employment and Earnings, May 1960, 1965, 1970, and 1974. U.S. Department of Commerce, Bureau of the Census: Annual Report on the Labor Force, 1940-55. Social Science Research Council: "Labor Force in the United States, 1890-1960."

[29] Since the table includes females in the 16-18 age range, many of whom attend school full-time, as well as retirement-age women, the percentages are considerably lower than they would be if those under 18 and over 64 were excluded from the count.

Appellant apparently concedes the substance of women's current participation in the labor force, but hypothesizes that today's retirement-age women fit the stereotype: their men were breadwinners; they are wives and widows. See Brief in Opposition at 4. In fact, the working lives of Hannah Goldfarb, Shirley Silbowitz, Edna Coffin, Bette Jablon and Mildred Abbott[30] indicate a pattern documented for their generation, "the present generation of retirement-age women":

> In the 1940's the [labor force participation] rates for women 35 and over (excluding those 60 and over) began climbing sharply and steadily as ever-growing proportions of mothers of school-age children took jobs. By 1950, although the young, mostly single, women still had the highest rates, the rates for women 35 and older had moved much closer. Many of these women either continued to work after World War II or returned later. By 1960 the rate for women 45 to 54 (50 per cent) had risen to such an extent that it was noticeably higher than the proportion for 20- to 24-year-old women (45 per cent), and the proportion among women 35 to 44 (44 per cent) was only slightly below that of the women in their early twenties.

1975 Handbook on Women Workers 12, tabulating the facts as follow (Table 3):

[30] See text at note 11 *supra*.

LABOR FORCE PARTICIPATION RATES OF WOMEN, BY AGE, SELECTED YEARS, 1940-74*

Age	1974	1960	1950	1940
35 to 44 years	54.6	44.3	(38.2)**	(29.4)
45 to 54 years	54.9	49.5	(37.1)	(24.5)
55 to 64 years	41.7	(37.4)	(27.6)	(18.0)

* Data are for civilian noninstitutional population in March 1940 and in April of other years.

** Parentheses indicate women now at or past retirement age.

Source: U.S. Department of Labor, Bureau of Labor Statistics: Employment and Earnings, May 1974 and Special Labor Force Report No. 14; U.S. Department of Commerce, Bureau of the Census: Current Population Reports, P-57, No. 94 and P-50, Nos. 22 and 32.

See also 1975 Manpower Report of the President, Table 1 at 57, Labor Force Participation Rates of Women, by Age Group, Selected Years 1950 to 1973 and Projected 1980 and 1990; U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review 21 (November 1975) (reporting that in 1974, 54% of women 55-59 were gainfully employed, 75.4% of them at full-time jobs).

In sum, the §402 differential is characteristic of laws unconcerned with women workers, their status and security, and the reality of family economic interdependence. It indicates the legislators' traditional idea about the unimportance of women's earnings and the significance of men's. The differential diminishes the value of women's contributions to family income and impacts with particular severity on two-earner couples at low income levels. Approximately one out of four families with incomes below $5,000 relies on the wife's earnings for at least half of the total family

income. See U. S. Department of Labor, Bureau of Labor Statistics, Special Labor Force Report 130, Marital and Family Characteristics of Workers, Table U, p. A-24 (March 1970) (based on 1969 family income figures), discussed in Bell, *supra*, Economic Independence for Women at 240-43. In these families, the unit is surely "dependent" on income produced by the wife. Yet her 50-74.9% contribution to the unit's support through employment covered under the Federal Insurance Contributions Act secures no old-age or survivors' benefits for her spouse. See *Clark* v. *Celebrezze, supra.*

No legitimate government interest is served by a social insurance scheme that favors and rewards men's employment more than women's. Statutory gender lines so drawn underestimate women's contributions to family support,[31] overestimate men's, and place an official imprimatur on categorization of women as second-class workers.

C. *Exclusion of the spouse of a working woman from social insurance benefits accorded the spouse of a working man does not operate to remedy the effects of past economic discrimination against women.*

In *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), and *Kahn* v. *Shevin*, 416 U.S. 351 (1974), this Court upheld gender lines regarded as operating solely to compensate women for past and present economic disadvantages. *Ballard* and *Kahn* were perceived as cases in which some women were helped, and no women were harmed by the classification in question.[32] By contrast, even on the dubious assumption

[31] Cf. note 26 *supra.*

[32] Further, the *Kahn* decision is specifically and narrowly tied to the "large leeway" traditionally accorded states with respect to their system of taxation. 416 U.S. at 355. Cf. *Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Labine* v. *Vincent*, 401 U.S. 532 (1971) (indicating similar deference to local concerns). And the discrimination §402 "works against the female breadwinner readily distinguishes this case from *Norton* v. *Weinberger*, 390 F. Supp. 1084 (D. Md. 1975) [*aff'd*, —— U.S. —— (June 29, 1976)]." *Jablon* v. *Secretary of Health, Education, and Welfare, supra*, 399 F. Supp. at 130 n. 19.

Ballard presented the tangled problem of a military career system fraught with discrimination against women, no challenge to that discrimination, but only a 20-year retirement-motivated claim by a "mustang" (enlistee-turned-officer) with an idiosyncratic case. See Davidson, Ginsburg & Kay, Sex-Based Discrimination, 1975 Supplement at 14 (West Pub. Co.). Nor did *Ballard* involve a consideration present here: legislative reluctance to "count" a female worker as fully as a male worker may reflect the unstated fear that a full count for women workers would erode male prerogatives.

that Congress intended the §402 differential to help women as individuals (rather than as appendages of men), the gender line *sub judice* plainly operates to "heap on" women wage earners additional economic disadvantages. See *Frontiero* v. *Richardson, supra*, 411 U.S. at 689 n.22; *Jablon* v. *Secretary of Health, Education, and Welfare, supra*, 399 F. Supp. at 128-30.

In assessing classifications based on "gender as such,"[33] this Court no longer accepts at face value "recitation of a benign, compensatory purpose" for legislation that ranks women as men's dependents. *Wiesenfeld, supra*, 420 U.S. at 648; see *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Stanton* v. *Stanton*, 421 U.S. 7 (1975). The case at bar presents a textbook example of the insidious discrimination characteristic of laws that treat men as the breadwinners that count, women as men's subordinates. Far from alleviating discrimination in the economic sphere, the §402 3:1 marital unit support test reflects attitudes and perpetuates prac-

[33] *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974).

tices responsible for that discrimination. See generally Chafe, Looking Backward in Order to Look Forward: Women, Work and Social Values in America, in American Assembly, Women and the American Economy 6 (Kreps ed. 1976). Significantly, when Congress genuinely determined to remedy economic discrimination against women, and focused directly on "firmly entrenched practices" inhospitable to women's claims to equal opportunity and equal remuneration in the job market (cf. 416 U.S. at 353), it flatly rejected the stereotype that underlies §§402(e)(1)(C) and (f)(1)(D). Consistent with the equal protection principle, Congress declared the female worker, her spouse and family entitled to the same benefits as the male worker, his spouse and family. Support tests for the woman's spouse were eliminated, along with all other gender-based differences in benefit terms and conditions. See, *e.g.*, 5 U.S.C. §7152 and kindred measures cited at pp. 51-58 *infra*.

Nor does *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968),[34] shield from close review the invidious distinction drawn in §402. *Gruenwald* involved a differential specifically tied to past discrimination *female wage earners* experienced in the labor market: depressed wages and early retirement policies applied by employers to women but not to men. Without the more favorable calculation formula, a formula applied to amounts in fact earned by women, past wage and job placement discrimination would have been aggravated by projection into

[34] Followed in *Kohr* v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa. 1974), *judgment vacated*, 422 U.S. 1050 (1975); *Polelle* v. *Secretary of Health, Education, and Welfare*, 386 F. Supp. 443 (E.D. Ill. 1974); and *Lewis* v. *Cohen*, —— F. Supp. —— (E.D. Pa. March 5, 1976) [44 U.S.L.W. 2457].

the working woman's retirement years. Thus the *Gruenwald* differential operated to alleviate past discrimination against wage-earning women without disadvantaging any member of that class." By contrast, a law denying to a female wage earner's spouse or family benefits available to a male wage earner's spouse or family cannot be rationalized by reference to wages paid to gainfully-employed women and does nothing to rectify past wage discrimination against them. Instead, congressional attention to the wives of insured wage earners is expressed in a scheme that impacts adversely on wives who are insured wage earners themselves. Far from assisting women toward equal status in economic endeavor, the classification fortifies the assumption, harmful to women, that labor for pay with attendant benefits is primarily the prerogative of men. See Matthews, Women Should Have Equal Rights With Men, 12 A.B.A.J. 117 (1926); Note, 89 Harv. L. Rev. 95 (1975).

In providing secondary benefits under a male wage earner's account as of right without regard to the dependency of his spouse, while imposing a 3:1 marital unit support test for secondary benefits under a female wage earner's account, Congress may well have been guided by the notion that "men are more likely than women to be the primary suporters of their spouses," a notion "not entirely without empirical support." But as the Court explained in *Wiesenfeld*, *supra*, 420 U.S. at 645:

[35] See *Kohr* v. *Weinberger*, *supra*, 378 F. Supp. at 1302 n.5. Congress evidently regarded the *Gruenwald* differential as a transition measure. In 1972, it extended to men the more favorable calculation formerly reserved to women. Act of October 30, 1972, §104, P.L. 92-603, 86 Stat. 1340.

> [S]uch a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

In sum, three times in as many years, this Court has been invited by the Government to shield as "benign" a classification that instructs the gainfully-employed female: your earnings, solely on the basis of your sex, are less valuable to your spouse and family than the earnings of a similarly situated male. The Court declined that invitation to dissemble in *Frontiero* and *Wiesenfeld*. On this third occasion, it is time to strike the batter out.

D. *Administrative convenience does not justify gross categorization by gender.*

In *Frontiero, supra,* 411 U.S. at 689-90, this Court laid to rest the notion that "administrative convenience" could serve as a cover for legislative resort to sex stereotyping as a basis for line drawing. See also *Taylor* v. *Louisiana,* 419 U.S. 522 (1975) (discarding administratively convenient assumption that woman's central place is at home); *Mathews* v. *Lucas,* —— U.S. —— (June 29, 1976) (Slip Opinion at 17). Here, as in *Frontiero,* the Government "offers no concrete evidence" that presuming women dependent "in fact saves the Government any money." 411 U.S. at 689. For it is beyond debate that many millions of married women earn enough to cover at least half of their own living expenses. See p. 30 *supra;* Brief for the Appellant at 34 (the median average contribution of the wife to total family income exceeds the 25% limit required for qualification under the one-half support test). Thus a dependency test applicable to men but not to women cannot be justified as a reasonable, economy-minded substitute for sex-neutral, functional classification.[36]

Nor does characterization of Leon Goldfarb's complaint as a claim for "a windfall" (Brief for the Appellant at 8, 38) avoid collision with constitutional principle.[37] Male wage earners' accounts attract benefits for non-dependent wives. Similarly situated female wage earners deserve no

---

[36] Women's receipt of approximately 54% of social security payments, hardly evidence of discrimination against male workers, barely corresponds to women's representation in the nation's population. Women 65 and over are 12.1% of the female population; men 65 and over are only 8.8% of the male population. See U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Special Studies, Series P-23 No. 58: A Statistical Portrait of Women in the United States 1, 2, 5 (Table 1-2), 7 (April 1976). Of course, a man who enjoys long life would receive benefits based on his individual situation and would not be denied benefits on the basis of a gross gender classification. Similarly, as low paid workers, in common with men whose earnings are low, many women are aided by the weighted formula for benefit payments, *i.e.*, the highest percentage of benefits is paid for the first $110 of monthly earnings. 42 U.S.C. §415. This formula benefits *individuals* with low incomes, many of whom are women, but it does not discriminate against men.

[37] The "windfall" argument pressed by the Government in *Frontiero* with respect to veterans' benefits recipient Joseph Frontiero, Brief for the Appellees at 8-10, was firmly rejected by this Court. See 411 U.S. at 689. Impelled by the 8-1 *Frontiero* judgment, and enlightened by directives of his own and other federal departments, appellant has acknowledged that a dependency test for fringe benefits, identical to the one in the case at bar, would be illegal. The gross gender classification would render the test invalid. See pp. 56-60 *infra.* Moreover, a more subtle, facially-neutral device should fare no better. As the Equal Employment Opportunity Commission has publicized, benefits accorded an employee's spouse, when tied to proof of dependency, "discriminatorily affect the rights of women employees." See 29 C.F.R. §1604.9.

less protection for their spouses. See *Jablon* v. *Secretary of Health, Education, and Welfare, supra,* 399 F. Supp. at 130.[38] Denial of benefits under a female wage earner's account, but automatic provision of them under a male wage earner's account, underscores for the woman her second-class status as a gainfully-employed individual. This reality is not disguised by telling her that "windfalls" are reserved for those who claim under the account of a man."[39]

E. *Budgetary considerations do not justify resort to an otherwise invidious gender classification.*

In *Frontiero* and *Wiesenfeld* this Court declared invidiously discriminatory congressional action that cast the weight of the law on the side of "the role-typing society has long imposed." *Stanton* v. *Stanton, supra,* 421 U.S. at 15. The military fringe benefits arrangement in *Frontiero* and the mother's benefit in *Wiesenfeld* reflected twin congressional judgments: (1) traditional family relationships, anchoring wife to the home, should be favored and encouraged; (2) incentives, favors and encouragement available to the married man as income earner need not be accorded the married woman as income earner. These paired

[38] Cf. Motion to Affirm at 2a, 4a, *Mathews* v. *Jablon*, No. 75-739, and *Mathews* v. *Coffin*, No. 75-791 (female insured individual Edna Coffin and spouse Edgar Coffin were approximately equal earners, her public employees' pension benefits were slightly higher than his).

[39] Cf. Van Alstyne, The Demise of the Rights-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1454-57 (1968). With respect to low-income earners, see *Clark* v. *Celebrezze, supra,* and pp. 33-34 *supra*, the "windfall" characterization is particularly dubious. Moreover, to the extent that the current structure of social security provides a "windfall" for federal employees, the source of the "windfall" is wholly unrelated to husband's and widower's benefits. See 1975 House Hearings, Financing the Social Security System 150, 422-23, 539.

judgments, signalled by resort to gender rather than functional classification, were assessed as "invidious." They retain that character here,[40] for surely the Court's precedent makes it clear that neither administrative convenience nor fiscal policy considerations can justify invidious gender discrimination. Cf. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969); *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974); *Graham* v. *Richardson,* 403 U.S. 365 (1971); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973); *United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *Schlesinger* v. *Ballard,* 419 U.S. 498, 503 (1975) ("administrative or fiscal policy considerations" insufficient reason for gender line); *Sosna* v. *Iowa,* 419 U.S. 393, 406 (1975) (budgetary or record-keeping considerations or administrative convenience insufficient to justify durational residency requirement).

In *Shapiro* v. *Thompson, supra,* the Court confronted a determination by Congress and at least 40 states that public money should not be spent on welfare aid to new residents. Appellant's brief in that case cited the legislative history of the one-year residence requirement, and identified as the principal reason for the requirement the legislature's desire to limit welfare costs. Brief for Appellant at 8-10, *Shapiro* v. *Thompson, supra.* This Court's determination: the Constitution requires payment of benefits to the class deliberately excluded by the legislature. Accord, *Memorial Hospital* v. *Maricopa County, supra.* Significantly, although

[40] See Testimony of Harvard economist Martin Feldstein, 1975 House Hearings, Financing the Social Security System 388 ("[T]he imposition of taxes without corresponding benefits reduces the incentive of wives to work and thus diminishes their labor force participation and their average hours of work. As the social security tax grows, this unfair treatment becomes a problem of increasing importance.").

the Court in *Shapiro* closely scrutinized the classification, it indicated that the one-year residence requirement was vulnerable even under the traditional, more lenient "rational basis" standard of equal protection review. 394 U.S. at 638.

In *Graham* v. *Richardson, supra,* state legislative determinations excluding aliens from public assistance programs were overturned by the Court; public funding had to be enlarged, despite the contrary command of the state legislature, to encompass persons entitled to equal protection under the nation's highest law.

In *New Jersey Welfare Rights Organization* v. *Cahill, supra,* this Court struck down the "ceremonial marriage" limitation in New Jersey's program for assistance to families of the working poor, thereby substantially enlarging the beneficiary class and the toll on the state fisc. It bears emphasis that the case at bar, unlike *New Jersey Welfare Rights Organization,* presents no question of federal deference due state policies on issues of local concern. And, plainly, leeway for legislative line drawing in the contributory Federal social security program is no broader than leeway for wholly state financed and operated public assistance programs. Further, no "fundamental right" or "suspect" criterion was identified by this Court in *New Jersey Welfare Rights Organization* when it summarily reversed the decision below (349 F. Supp. 491 (1972)) and, per curiam, declared the "ceremonial marriage" limitation on aid to the working poor impermissible. Accord, *United States Dep't of Agriculture* v. *Moreno, supra* (limiting food stamp program to households

in which members are related to one another violates equal protection); *Vlandis* v. *Kline,* 412 U.S. 441 (1973) (in-state tuition); *Demiragh* v. *DeVos,* 476 F.2d 403 (2d Cir. 1973) (welfare benefits); *de Castro* v. *Weinberger,* 403 F. Supp. 23 (N.D. Ill. 1975) (divorced wife's child-in-care social security benefit); *Vaccarella* v. *Fusari,* 365 F. Supp. 1164 (D. Conn. 1973) (augmented unemployment benefits for child in worker's care); *Bowen* v. *Hackett,* 361 F. Supp. 854 (D.R.I. 1973) (state unemployment and disability insurance benefits); *Chatman* v. *Barnes,* 357 F. Supp. 9 (N.D. Okla. 1973) (state social insurance disability benefits); *Miller* v. *Laird,* 349 F. Supp. 1034 (D.D.C. 1972) (medical care for service members' children born out of wedlock) (all decisions, like *Frontiero* and *Wiesenfeld,* identifying unconstitutional exclusions from government benefits without labelling the right asserted "fundamental" or the legislative criterion "suspect").

Moreover, the cost of eliminating the one-way dependency test will be comparatively low at the outset[41] and should diminish increasingly with the passage of time as we progress toward the recognized goal of universal social se-

---

[41] Women and Social Security, a Working Paper prepared by the Task Force on Women and Social Security for use of the Special Committee on Aging, United States Senate, Committee Print, 94th Cong., 1st Sess. 20 (1975); Testimony of former Commissioner of Social Security Robert M. Ball, Hearings on the Economic Problems of Women, Before the Joint Economic Committee, United States Congress, Part Two, July 24-30, 1973, at 314 (without taking into account offsetting savings effected by women's constantly increasing labor force participation rates, or the impact of further shrinkage of the noncovered wage earner class, cost of removing dependency requirements for husbands and widowers would be met by increase in contribution rate of about 0.05% on employers and 0.05% on employees).

curity coverage of wage earners.[42] Shrinkage of the noncovered wage earner class has been the consistent pattern.[43]

In 1935, when the Old Age and Survivors Insurance program was inaugurated, approximately 50% of Americans gainfully employed were covered; today, over 90% are covered by the legislation. Compare S. Rep. No. 628, 74th Cong., 1st Sess. (1935), with Railroad Retirement System Report, H.R. Doc. No. 350, 92d Cong., 2d Sess. 107 (1972). Exclusions still remaining are few, and even fewer may be expected to persist, for coverage of all gainfully-employed individuals remains a primary objective.

Principal noncovered groups are career employees of the railroads and most employees of the federal government. State and local government employees constitute the only other noncovered group of any magnitude. But today, about two-thirds of state and local government employees are insured individuals under social security. 1975 House Hearings, Financing the Social Security System 423. Inclusion of railroad workers[44] and federal employees[45] continues to be urged as a rational measure toward which movement should be "rapid."

---

[42] See 1975 House Hearings, Financing the Social Security System 150, 362, 422-23.

[43] For earlier statement of the universal coverage goal, see Recommendations for Social Security Legislation, Report of the Advisory Council on Social Security to the Senate Finance Committee, S. Doc. No. 208, 80th Cong., 2d Sess. 6 (1949).

[44] Railroad Retirement System Report, H.R. Doc. No. 350, 92d Cong., 2d Sess. (1972).

[45] 1975 House Hearings, Financing the Social Security System 150, 422-23.

Further, the overall cost of benefits to spouses is inaccurately projected by appellant's one-eyed estimate.[46] Offsetting coverage for the female wage earner's spouse is the constantly increasing extent to which wives and widows earn benefits under their own accounts. See 1975 House Hearings, Financing the Social Security System 80, 317-18 (female labor force participation rates predicted to increase faster then previously projected; currently, 1.9 million wives of retired workers, 42% of all such wives now on the rolls, receive primary benefits based on their own earnings); cf. Hearings on H.R. 6635, Social Security Amendments of 1939, before the House Committee on Ways and Means, 76th Cong., 1st Sess. 59 (1939).

---

[46] In *Wiesenfeld*, *supra*, appellant's estimate for eliminating explicit gender lines in the Social Security Act, presented in an affidavit submitted to the district court, was some "$300 million" ($125 million for the widower's benefit here in question). Brief for the Appellant at 22 and Appendix at 15, *Weinberger* v. *Wiesenfeld*. This time round, appellant has not felt constrained by his presentation in the court below. In lieu of reference to material in the record, appellant tenders in his brief to this Court new and escalated figures (both as to the number of persons affected and the dollar amount), and a "methodology" appendix. Brief for the Appellant at 37. It is surely questionable whether this High Court is the proper forum for initial introduction of appellant's "methodology" (Brief for the Appellant at 1A-6A) and augmented figures (Brief for the Appellant at 39), concededly based in substantial part on "a small sample of cases" (4A), "sketchy data," and "very rough" estimates (6A). Further, appellant makes no attempt to place his escalated figure in context. The $447 million now claimed as the total initial year cost for covering husbands, widowers and disabled widowers, is about two-thirds of 1% (0.67%) of annual social security receipts. See 1976 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds at 2 (income of the old-age, survivors and disability insurance system during fiscal year 1975 amounted to 66.7 billion, outgo totaled 64.7 billion, yielding a 2 billion increase in the trust funds, bringing the funds' balance to a level of 48.1 billion on June 30, 1975).

Beyond question, strains on the social security program are a matter of grave concern. But those strains are unrelated to the gender pigeonholing here at issue. They are caused by current and projected demographic shifts in the nation's population—later entrance of young people into the work force, increased longevity and lower birth rates. These shifts mean (1) fewer working years and longer retirements for individuals insured under social security, and (2) a steady decline in the ratio of workers paying Federal Insurance Contributions Act taxes to social security beneficiaries. 1975 House Hearings, Financing the Social Security System 5, 7, 11, 25, 26, 66, 392, 436, 441, 600, 654, 658, 670. Senior citizens constitute a sizeable and steadily increasing portion of the nation's population. In 1930 the United States population included 9.7 people age 65 and over for every 100 people of working age (20-64 years); by 1973, the figures had changed to 18.6 people 65 and over for every 100 of working age. 1975 House Hearings, Financing the Social Security System 600. This change will undoubtedly require corresponding alteration in the nation's old-age and survivors insurance program.

Congress has on its agenda adjustments needed to alleviate immediate strains[47] and to tailor the social security system to demographic projections for the decades ahead.[48]

---

[47] High unemployment is a principal contributor to immediate strains. The Social Security Administration has reported that reduction of unemployment to 5% would result in a $44.2 billion addition to the social security trust funds between fiscal year 1975 and 1981 rather than any depletion. 122 Cong. Rec. H1666 (daily ed. March 4, 1976).

[48] Social Security Commissioner James B. Cardwell has emphasized the absence of urgency in revising social security. He reported to Congress, the system "has a contingency reserve that is clearly adequate for short term and sudden change." 1975 House Hearings, Financing the Social Security System 5, 7, 9, 11.

But no participant in the debate over revision or restructure of the social security system has advocated retention of gender classifications as a rational or realistic means to help hold the line, even for the shortest term. Far from viewing the "imperfection" of the current arrangement as "inevitable" (Brief for the Appellant at 38), and in stark contrast to appellant's charge that the court below "enlarged" the imperfection, legislative recommendations relevant to this issue are in notable accord: any benefit available to a male insured individual's spouse should be made available, on the same basis, to a female insured individual's spouse. See note 13 *supra* and note 65 *infra*.

In sum, overt gender classifications remaining in the Social Security Act are invidious. Rational fiscal policy considerations provide no prop for them.

III.

Employment-related benefits distributed by government must be allocated with an even hand and without resort to classification based on gender per se.

A. *Decisions of this Court and lower federal courts establish that classification based on gender per se is impermissible in employment-related regulation.*

In *Frontiero* v. *Richardson, supra*, this Court held that gender-based discrimination in the allocation of fringe benefits to married members of the uniformed services violated the Constitution's guarantee of equal protection. The *Frontiero* judgment struck down a support test for male spouses almost identical to the one imposed by 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D). Two years later, in *Wein-*

berger v. *Wiesenfeld, supra,* the Court declared surviving family units composed of widower and child entitled to the same social security benefits as those provided by statute for units composed of widow and child. *Wiesenfeld* and *Frontiero* concerned, as this case does, woman's status and associated benefits when she participates in economic activity outside the home. As a worker, she has been assigned an inferior place, often with the aid of laws purportedly intended for her protection. As Justice Brennan commented in *Frontiero* (411 U.S. at 684):

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage.

See also *Stanton* v. *Stanton, supra,* 421 U.S. at 15; *Taylor* v. *Louisiana, supra; Mathews* v. *Lucas,* —— U.S. —— (June 29, 1976) (Slip Opinion at 10, 17).

Spurred by a revived feminist movement[49] that has directed principal attention to employment-related inequities, legislatures and courts are responding with increased sensitivity to generators of a separate and unequal place for women in the labor force. As a perceptive male jurist observed:

> One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.

[49] See generally Chafe, The American Woman (1972); Janeway, Man's World, Woman's Place: A Study in Social Mythology (1971); Chafe, Looking Backward in Order to Look Forward: Women, Work and Social Values in America, in American Assembly, Women and the American Economy 6 (Kreps ed. 1976).

Green v. *Waterford Board of Education,* 473 F.2d 629, 634 (2d Cir. 1973).[50] To assure meaningful equal protection of the laws to women, courts have begun to undertake careful analysis of gender-based legislature classifications, particularly gender lines drawn in an employment-related setting. See, *e.g., Wood* v. *Mills,* 528 F.2d 321 (4th Cir. 1975) (gender-based wage differential for male and female jailers violates equal protection); *White* v. *Fleming,* 522 F.2d 730 (7th Cir. 1975) (ordinance may not place special restrictions on female tavern employees); *Andrews* v. *Drew Municipal Separate School District,* 507 F.2d 611 (5th Cir.), *cert. dismissed as improvidently granted,* 44 U.S.L.W. 4627 (May 3, 1976) (school board's refusal to employ mothers of children born out of wedlock held unconstitutional); *Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973) (equal protection requires that young women be permitted to serve as pages in South Carolina Senate under the same terms and conditions as young men); *Bowen* v. *Hackett,* 361 F. Supp. 854 (D.R.I. 1973) (dependent child allowance must be furnished disabled and unemployed men and women on the same basis); *Stevenson* v. *Castles,* Civ. No. 7452 (D.C.Z. November 15, 1974) (free tuition limited to children of "head of household" or "principal breadwinner" employees of the Canal Zone Government and Panama Canal Company "discriminat[es] against women in violation of the equality guaranteed to them under the decisions of the Supreme Court [citing *Frontiero*] and [Title VII of] the Civil Rights Act [of 1964]"). See also *Page* v. *Welfare Comm'n,* Connecticut Law Journal, February 24, 1976, p. 3

[50] Cf. *Henslee* v. *Union Planters Nat'l Bank & Trust Co.,* 335 U.S. 595, 600 (1949) (Frankfurter, J. dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").

(Conn. Supreme Court), excerpted in 44 U.S.L.W. 2426-27 (gainfully-employed daughter's income available for support of her indigent parent must be computed on same basis as gainfully-employed son's).[51]

In sum, the statutes before the Court in *Frontiero, Wiesenfeld* and the instant case were cut from the same pattern and convey the same message to the gainfully-employed woman: as a labor market participant she should not expect to be counted by her government as fully as her brother.[52] The plain fact is that the economic activity of Hannah Goldfarb netted less for the marital unit than the efforts of an identically situated gainfully-employed male. As the *Wiesenfeld* opinion indicates, it is hardly rational to condemn a compensation scheme under the *Frontiero* principle, but declare that same principle inoperative when the government distributes employment-related social insurance benefits.

---

[51] For earlier indicators, see *Mengelkoch* v. *Industrial Welfare Comm'n*, 442 F.2d 1119 (9th Cir. 1971) (maximum hours laws applicable to women only present substantial federal constitutional question); *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal.3d 1, 485 P.2d 529 (1971) (Federal and California Constitutions, as well as Title VII, bar exclusion of women from bartender occupation); *Paterson Tavern & Grill Owners Ass'n, Inc.* v. *Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970) (police power does not justify exclusion of women from bartender occupation); *Application of Shpritzer* v. *Lang*, 17 A.D.2d 285, 290, 234 N.Y.S.2d 285, 290 (1st Dep't 1962), *aff'd*, 13 N.Y.2d 744, 241 N.Y.S.2d 869 (1963) (exclusion of policewomen from promotional examination for sergeant would impermissibly deny constitutional rights solely because of gender); *Wilson* v. *Hacker*, 101 N.Y.S.2d 461 (Sup. Ct. 1950) (union's discrimination against female bartenders "must be condemned as a violation of the fundamental principles of American democracy").

[52] See *Bowen* v. *Hackett, supra;* note 14 *supra;* Note, 89 Harv. L. Rev. 95 (1975).

B. Federal laws governing private and public sector employment require employers to accord spouses of female employees all fringe benefits accorded spouses of male employees; these laws reflect the overriding concern of Congress to eliminate gender-based discrimination in the economic sphere.

The discrimination ordered by 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) is irreconcilable with the firm national commitment to eradicate per se differentials based on an individual's sex in all spheres of employment. Gender as a means to determine employment-related benefits has been declared unlawful by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.;* the Equal Pay Act of 1963, as amended, 29 U.S.C. §206(d); Executive Order 11246, as amended by Executive Order 11375, 3 C.F.R. 169, 42 U.S.C. §2000e note; Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.;* and statutes governing federal employment, *e.g.*, 5 U.S.C. §7152.

Sex Discrimination Guidelines issued by the Equal Employment Opportunity Commission pursuant to Title VII, 29 C.F.R. §§1604.1-1604.10,[53] provide:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; . . . 29 C.F.R. §1604.9(d).

The Guidelines, issued in 1972, are applicable to private as well as public employment; they explicitly proscribe

---

[53] See also (OFCC) Sex Discrimination Guidelines for Government Contractors, implementing Executive Order 11375, 41 C.F.R. §60-20, particularly §60-20.3(c), (d).

differential treatment of men and women of the precise kind and quality here at issue. Moreover, they reflect consistent administrative and judicial interpretation prior to the time the Guidelines formally issued. For example, the Equal Employment Opportunity Commission explained in a 1969 widowers' pension benefit ruling, Title VII "is intended to protect *individuals* from the penalizing effects of . . . presumptions based on the collective characteristics of a sexual group." EEOC Decisions, Case No. YNY9-034, CCH Emp. Practices Guide ¶6050 (June 16, 1969) (emphasis in original). The Commission appraised as discriminatory and detrimental to gainfully-employed women a pension plan with an automatic benefit for widows but no benefit for widowers capable of self-support.[54] For court confirmation of the underlying principle, see *Rosen* v. *Public Service Elec. & Gas Co.*, 477 F.2d 90 (3d Cir. 1973) (Title VII violated by pension arrangement allowing women to retire earlier on full pension);[55] cf. *Griggs* v. *Duke Power*

[54] Accord, Decision No. 70-513, CCH Emp. Practices Guide ¶6114 (February 4, 1970) (payment of death benefits to surviving spouses of male but not female employees ruled unlawful); Decision No. 71-1100, CCH Emp. Practices Guide ¶6197 (December 31, 1970); Decision No. 70-660, CCH Emp. Practices Guide ¶6133 (March 24, 1970); Decision No. 70-510, CCH Emp. Practices Guide ¶6132 (February 4, 1970); Case No. CL 7-6-694, CCH Emp. Practices Guide ¶6009 (May 19, 1969) (all ruling unlawful employer and/or union health insurance plans providing for coverage of spouses of male but not female employees).

[55] Accord, *Chastang* v. *Flynn and Emrich Co.*, 365 F. Supp. 957 (D. Md. 1973) (permitting women to retire five years earlier than men and vesting pensions twice as rapidly for females was not designed to "compensate" women but to secure hold over men to keep them on the job); *Fitzpatrick* v. *Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), *appeal on another point*, 519 F.2d 559 (2d Cir.), *cert. granted*, 44 U.S.L.W. 3358 (1975). For earlier EEOC rulings to the same effect, see Decision No. 72-1919, CCH Emp. Practices Guide ¶6370 (June 6, 1972); Decision No. 72-0702, CCH Emp. Practices Guide ¶6320 (December 27, 1971); Decision No. 71-562,

Co., 401 U.S. 424, 436 (1971); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1189 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

Similar rulings have been made by the Wage and Hour Division of the Department of Labor, which administers the Equal Pay Act. For example, the Division has ruled that the Act is violated by insurance plans pursuant to which the employer pays family coverage insurance premiums for married male employees but pays such premiums for married female employees only if they qualify as heads of their families. W & H Opinion Letter No. 425, CCH Emp. Practices Guide ¶1208.52 (February 11, 1966).[56]

With respect to federal employment, Congress enacted a catch-all in December 1971, to assure that national policy governing the private sector applies with full vigor to the United States itself. 5 U.S.C. §7152 (P.L. 92-187, 85 Stat. 644) stipulates that all regulations granting benefits to government employees

CCH Emp. Practices Guide ¶6184 (December 4, 1970); Decision No. 70-75, CCH Emp. Practices Guide ¶6049 (August 13, 1969) (all ruling unlawful different optional retirement ages and benefits for men and women).

[56] See also W & H Opinion Letter No. 1275, CCH Emp. Practices Guide ¶5178 (January 15, 1973) ("principal wage earner" criterion has the inevitable effect of excluding most married women and therefore constitutes discrimination based on sex); W & H Opinion Letter No. 420, CCH Emp. Practices Guide ¶1208.591 (February 11, 1966) (insurance plan permitting male employee to insure spouse whether or not she is working but not permitting female employee to insure spouse found unlawful); W & H Opinion Letter No. 388, CCH Emp. Practices Guide ¶1208.59 (October 14, 1965) (employer-paid insurance plan providing family hospitalization coverage for male but not female employees found unlawful).

> shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children . . . .

Further, 5 U.S.C. §7152 declares that

> any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

The section applies not only to other provisions of Title 5, but also to "any other provision of law granting benefits to employees."[57]

Particularized changes were made for situations not encompassed within the 5 U.S.C. §7152 catch-all. Veterans' preferences formerly limited to wives and widows were extended in full to husbands and widowers. 5 U.S.C. §2108, as amended December 1971 by P.L. 92-187, 85 Stat. 644. Educational assistance allowances for veterans were equalized in the same manner. Formerly, Congress had defined the term "dependent," for purposes of an augmented veterans' educational assistance allowance (see 38 U.S.C. §1682), to include all wives, but to exclude husbands capable of self-support. Significantly, the amendment redefines "dependent" to include all husbands as well as all wives of eligible veterans. 38 U.S.C. §102(b), as amended October

[57] See also 5 U.S.C. §7151 (declaring it U.S. policy to insure equal employment opportunity without discrimination because of, *inter alia*, sex); 5 U.S.C. §7154 (prohibiting discrimination in federal employment because of, *inter alia*, sex); 5 U.S.C. §8902(f) (prohibiting exclusion from federal employee health benefit plans because of, *inter alia*, sex).

1972 by P.L. 92-540, 86 Stat. 1092. No support or need test is part of the scheme. Rather, the statute is premised on the interdependence of spouses.

Congress similarly adjusted the provision for cost of living allowances covering dependents of federal employees residing in foreign areas. Formerly, the allowance was allocated to "the employee's wife." The amendment extended the allowance to encompass "the employee's spouse." 5 U.S.C. §5924, as amended December 1971 by P.L. 92-187, 85 Stat. 644. Housing allowances for male and female members of the uniformed services and their spouses were equalized July 9, 1973 in accordance with this Court's May 14, 1973 *Frontiero* decision. 37 U.S.C. §401, as amended by P.L. 93-64, 87 Stat. 148.[58] Provisions of the Federal Employee's Compensation Act were amended in September 1974 to assure equality of secondary benefits for the spouses of men and women in the civilian service. 5 U.S.C. §§8101 (6) and 8101(11), as amended by P.L. 93-416, 88 Stat. 1143.

Of special note, even before enactment of the 5 U.S.C. §7152 catch-all, Congress altered the Civil Service Retirement Act to accord widowers the same automatic qualification as widows for survivors' annuities. 5 U.S.C. §8341. as amended January 1971 by P.L. 91-658, 84 Stat. 1961. A concise explanation for the change appears in H.R. Rep. No. 91-1469, 91st Cong., 2d Sess.:[59]

[58] The *Frontiero* equalization has been declared fully retroactive. 53 Comp. Gen. 148 (August 31, 1973).

[59] This change alone renders untenable appellant's ultimate argument that: 1) federal civil service retirement is "an alternative system" to social security; it would "distort the statutory scheme" to remove the widower's dependency test from social security. Brief for the Appellant at 8, 38. For an eminently clear policy was expressed by Congress when it removed the widower's

> [T]he present provision is discriminatory in that it runs counter to the facts of current-day living, whereby the woman's earnings are significant in supporting the family and maintaining its standard of living. Accordingly, the bill removes the dependency requirements applicable to surviving widowers of female employees, thus according them the same treatment accorded widows of deceased male employees.

In all these measures, Congress rejected the independent man/dependent woman model once pervasive in federal and state legislation.[80] Instead, the principle informing the change is the economic and social interdependence of wife and husband, their partnership in a marital unit composed of two individuals of equal human status and dignity.

Appellant himself has placed in sharp focus the anachronistic quality of the congressional direction he is obliged to support in the case at bar. Carrying out a flatly contra-

---

dependency test for secondary federal civil service retirement benefits. That policy should apply with equal force to social security. Again, it is instructive to view the matter in light of Hannah and Leon Goldfarb's situation. If Hannah had been the federal employee, insured under the federal civil service retirement system, Leon, as surviving spouse, would have qualified for monthly benefits until his death without regard to his dependency.

[80] For examples of similarly-motivated change in state laws, see 1975 Handbook on Women Workers 328 (formerly "women only" minimum wage laws extended to men); Freed & Foster, Taking Out the Fault but not the Sting, 12 Trial No. 4, 10 at 11 n.16 and 12 n.57 (April 1976) (in at least 32 states maintenance (alimony) "has been 'desexed' and, in accord with equal protection principles, has been made available to either party"); Note, 9 U. Mich. J. L. Ref. 138, 139, 161 n.161 (1975) (state workers' compensation legislation amended to extend conclusive presumption of dependency to widowers).

> dictory congressional command of more recent vintage, Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.*, appellant has declared that recipients of federal funds may not withhold from the spouse of a female wage earner *any* benefit provided to the spouse of a male wage earner. In Final Title IX Regulations Implementing Education Amendments of 1972 Prohibiting Sex Discrimination in Education, 45 C.F.R. §86.56-58, appellant has directed:
>
> §86.56
>
> • • • • •
>
> (b) *Prohibitions.* A recipient shall not:
>
> (1) discriminate on the basis of sex with regard to making fringe benefits . . . available to spouses . . . of employees differently upon the basis of the employee's sex;
>
> • • • • •
>
> (3) . . . participate in a pension or retirement plan which . . . discriminates in benefits on the basis of sex.
>
> §86.57
>
> (a) *General.* A recipient shall not apply any policy or take any employment action:
>
> • • • • •
>
> (2) which is based on whether an employee . . . is the head of household or principal wage earner in such employee's . . . family unit.
>
> • • • • •

§86.58

• • • • •

(b) *Benefits.* A recipient which provides any . . . benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same . . . benefit to members of the other sex.

These Title IX Regulations reflect legislative as well as executive consideration. Approved by the President in June 1975, the Regulations were placed before Congress for a forty-five day period during which hearings were held thereon, and became effective on July 21, 1975. For appellant's earlier declaration of the same position, see U.S. Department of Health, Education, and Welfare, Higher Education Guidelines pursuant to Executive Order 11246, October 1, 1972, at 13: "It is . . . unlawful for an employer to make benefits available to the wives and families of male employees where the same benefits are not available to the husbands and families of female employees."

The typical case to which appellant's Regulations and Guidelines are addressed illustrates the irony and illogic of his position in this litigation:

> W, a married woman, retires in 1973 and dies in 1974. E, her employer, conditions retirement and death benefits for her spouse (H) on proof that H received at least half his support from W, but grants the benefits in question automatically to the spouse of a male employee.

Appellant has declared that the differential just described, when invoked by E, causes and continues relegation of

women to an inferior position in the economy. But the very same differential, when invoked by appellant pursuant to 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D), is alleged to redress gender discrimination by ameliorating the inferior economic status of women. E might well wonder why he is not permitted to utilize a differential identical to the one appellant applies to the same couple. His bewilderment may be compounded should he determine to integrate his employees' pension scheme with social security. For it simply defies reason to claim that the classification perpetuates gender discrimination when it appears in an employer's pension scheme, but assuages or rectifies gender discrimination when it appears in the nation's "earned right," employment-related social insurance program. As expressed in recent commentary: "It would be highly anomalous for a court to decide that the sex classifications of OASDHI meet either the rational relationship or the compelling state interest test, when such classifications are not allowed in employment plans within the private sector." Note, Sex Classifications in the Social Security Benefit Structure, 49 Ind. L.J. 181, 193, 195 (1973).

In comparison to the otherwise uniform federal approach to employment-related benefits, 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) stands out as a glaring anomaly, an isolated and anachronistic backwater. Indeed, there is but one rational explanation for appellant's defense of the §402 gender line in this Court at the very time appellant condemns use of that line by employers subject to his scrutiny: In both cases appellant is carrying out congressional orders. But the conflict in those orders and in their underlying premises is inescapable. One is wedded to an old

and misguided paternalistic notion; it "coincide[s] with the role-typing society has long imposed." *Stanton* v. *Stanton, supra,* 421 U.S. at 15. The other reflects appreciation that in an egalitarian union, man depends on woman fully as much as woman depends on man.

IV.

Consistent with the dominant congressional purpose, to provide old-age and survivors insurance in a manner that respects the dignity of the aged, the court should declare 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) unconstitutional insofar as these provisions deny to the spouse of a female wage earner benefits accorded the spouse of a male wage earner.

The court below, upon determining that the challenged differential discriminates impermissibly on the basis of gender, found the appropriate remedy—invalidation of the widower's support test—plainly marked by this Court's decisions. Accord, *Silbowitz, Jablon, Coffin, Abbott, supra,* pp. 15-16. In *Wiesenfeld,* this Court unanimously affirmed a judgment declaring[61]

> 42 U.S.C. Section 402(g) is unconstitutional insofar as it discriminates against widowers on the basis of sex.

Appellant, Secretary of Health, Education, and Welfare, was

> enjoined from denying benefits under Section 402(g) to widowers solely on the basis of sex

[61] See Jurisdictional Statement at 23a, *Weinberger* v. *Wiesenfeld.*

and

> directed to make payments to the plaintiff Stephen Wiesenfeld for such periods during which he would have been qualified to receive benefits but for the discrimination . . . based upon sex contained in Section 402(g).

Similarly, in *Frontiero, supra,* 411 U.S. at 691, the Court held:

> [T]he challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.

The accompanying footnote (411 U.S. at 691 n. 25) reiterates:[62]

> Our conclusion in no wise invalidates the statutory schemes except insofar as they require a female member to prove the dependency of her spouse.

Both judgments reflect the Court's conclusion that extension of benefits to the spouse of a female wage earner under the same terms and conditions as those applicable to the spouse of a male wage earner would better serve the congressional purpose than would judicial destruction of the basic benefit scheme.

[62] See 53 Comp. Gen. 148 (August 31, 1973) (retroactive application of *Frontiero* to all similarly situated married members of the uniformed services); 40 F.R. 27744 (July 1, 1975) (announcing Veterans Administration policy to pay retroactively dependency allowances for the spouses of female veterans covering the period during which the Administration denied such allowances absent proof that the female veteran supplied over half her husband's support).

Precedent old and new points unambiguously in the remedial direction followed in *Wiesenfeld* and *Frontiero*. The appropriate inquiry was clearly stated by Mr. Justice Harlan in *Welsh* v. *United States*, 398 U.S. 333, 355-56 (1970) (concurring opinion): When a federal statute denies equal protection by establishing an unconstitutional classification, the judiciary must determine "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional." Accord as to state legislation *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 542-43 (1942); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931).[23]

In addition to *Wiesenfeld* and *Frontiero*, an array of recent decisions, involving state as well as federal laws, indicates this Court's preference for salvage, rather than demolition, of a constitutionally infirm legislative product. *E.g.*, *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974) (state health care); *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (federal food

[23] A succinct statement of the proper judicial perspective appears in *Schmoll* v. *Creecy*, 54 N.J. 194, 202, 254 A.2d 525, 529-30 (1969):

> [T]he judiciary cannot enlarge the reach of a statute, for that is solely a legislative function. The proposition is obvious enough, and it is equally true that a court may not restrict the scope of a statute. But neither proposition is involved when the question is whether a statute must fall because of a constitutional defect. Rather the question is whether the Legislature would want the statute to survive, and that inquiry cannot turn simply upon whether the statute, if adjusted to the constitutional demand, will cover more or less than its terms purport to cover. Although cases may be found which seem to speak in such mechanical terms, we think the sounder course is to consider what is involved and to decide from the sense of the situation whether the Legislature would want the statute to succumb.

stamps); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973) (state aid to families of the working poor); *Graham* v. *Richardson*, 403 U.S. 365 (1971) (state public assistance); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (state and District of Columbia public assistance). In all of these cases, the extensions necessary to bring the statutes in line with constitutional limitations required substantial expenditures of public funds. In two of them, *United States Dep't of Agriculture* v. *Moreno* and *New Jersey Welfare Rights Organization* v. *Cahill*, the remedy was not tied to any "fundamental right" or "suspect criterion" determination. Similarly, in *Shapiro* v. *Thompson*, although the Court closely scrutinized the classification, it indicated that the same result would follow even under the traditional, more lenient "rational basis" standard of equal protection review. 394 U.S. at 638.

The remedial issue was treated explicitly in *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973). *Moritz* involved a tax deduction available to never married women with incapacitated dependents, but not to similarly situated never married men. The Tenth Circuit concluded: (1) the gender line was inconsistent with the fifth amendment; (2) Congress would prefer extension of the deduction to men, thereby preserving the benefit for women, to invalidation of the provision. 469 F.2d at 470. Significantly, the remedial route in *Moritz* was noted by this Court when it pursued the same course in *Frontiero*, *supra*, 411 U.S. at 691 n.25.

Following this Court's guidance, lower courts have directed extensions kin to the one ordered by the court below in the instant case. See, *e.g.*, *Demiragh* v. *DeVos*, 476 F.2d

403, 405 (2d Cir. 1973) (welfare benefits); *de Castro* v. *Weinberger*, 403 F. Supp. 23 (N.D. Ill. 1975) (divorced wife's child-in-care social security benefit); *Vaccarella* v. *Fusari*, 365 F. Supp. 1164 (D. Conn. 1973) (augmented unemployment benefits for child in worker's care); *Bowen* v. *Hackett*, 361 F. Supp. 854 (D.R.I. 1973) (unemployment and disability insurance benefits); *Chatman* v. *Barnes*, 357 F. Supp. 9 (N.D. Okla. 1973) (disability benefits); *Miller* v. *Laird*, 349 F. Supp. 1034 (D.D.C. 1972) (military medical benefits); *Page* v. *Welfare Comm'n*, Connecticut Law Journal, February 24, 1976, p. 3 (Conn. Supreme Court), excerpted in 44 U.S.L.W. 2426-27 (for purposes of determining amount adult child can contribute to indigent parent's support, married daughter must be granted all exemptions regulations provide for married sons); cf. *In re Estate of Legatos*, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (property exempt from tax when devised by wife to husband must also be exempt when devised by husband to wife).

Nor is the salvage approach a remedy of recent vintage. For decades, courts have recognized that, while the legislature ultimately may decide to revise or even abandon a statutory benefit, in the meantime, preservation rather than destruction of the legislation may be prescribed. See *Yale & Towne Mfg. Co.* v. *Travis*, 262 F. 576 (S.D.N.Y. 1919), *aff'd*, 252 U.S. 60 (1920) (tax exemptions granted by statute only to state citizens extended to citizens of other states); *Burrow* v. *Kapfhammer*, 284 Ky. 753, 145 S.W.2d 1067 (1940), noted in 54 Harv. L. Rev. 1078 (1941) (plaintiff added to exempt class to cure unconstitutional exclusion); *Quong Ham Wah Co.* v. *Industrial Accident Comm'n*,

184 Cal. 26, 192 P. 1021 (1920), *appeal dismissed*, 255 U.S. 445 (1921) (workers' compensation benefits extended to non-residents to cure constitutional infirmity); Note, 55 Harv. L. Rev. 1030, 1034-36 (1942).

It bears emphasis that the remedial issue in this case, as in *Wiesenfeld* and *Frontiero*, involves tentative adjudication, not definitive disposition by this Court. Ultimate authority and responsibility to eliminate or reshape the benefits in question remain with Congress. Consistent with the pattern unexceptionally followed by Congress in recent years, see pp. 51-60 *supra*, the benefits would not be retracted. Nor is it probable that Congress would saddle the Social Security Administration with the exorbitant administrative burden of applying a support test to all spouses. See *Jablon* v. *Secretary of Health, Education, and Welfare*, *supra*, 399 F. Supp. at 132 (reporting government counsel's representation that the administrative cost of an across-the-board dependency test could amount to as much as one billion dollars). Almost certainly, Congress would extend the same benefits to the spouses of male and female wage earners "without subjecting them to the humiliation" of a dependency test. See Remarks of Senator Walter F. George, Finance Committee Chairman, 96 Cong. Rec. 8491, 81st Cong., 2d Sess. (1950) (explaining that to avoid humiliating social security beneficiaries, the Finance Committee rejected a need or dependency qualification for old-age and survivors' payments to wives, widows and children).

Specific indicia of congressional preference abound. In recent years Congress has amended a host of federal employment-related benefit statutes to eliminate gender-based differentials. See pp. 53-56 *supra*. In no instance has Con-

gress effected equalization by cross-the-board application of a dependency test. In every instance it has extended to husbands or widowers the automatic qualification for secondary benefits once reserved for wives or widows.[64]

In the social security context, Congress has already embarked on repair necessary to eliminate gender-based differentials. Formerly, women received a more favorable retirement benefit calculation than men. In October 1972, Congress extended to male workers the more favorable computation formula once reserved for female workers. 42 U.S.C. §414(a)(1), as amended in October 1972 by P.L. 92-603, 86 Stat. 1329. Pertinent too is the broad separability clause contained in the Social Security Act. 42 U.S.C. §1303 provides:

> If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.

That section, of course, should divert the judiciary from any remedial course other than invalidation of 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D). See *Jablon* v. *Secretary of Health, Education, and Welfare, supra,* 399 F. Supp. at 131-32.

Finally, the U.S. Commission on Civil Rights, the Quadrennial Advisory Council on Social Security, and virtually

[64] Cf. the Equal Pay Act, 29 U.S.C. §206(d)(1), which encompasses employer expenditures for fringe benefits. The Act prohibits reducing the wage of any employee; it commands that in all cases, the required equalization must be up, never down. See *Brennan* v. *Corning Glass Works,* 417 U.S. 188 (1974) (full upward equalization is necessary to accomplish genuine neutrality).

every other official report and reasoned analysis in point recommends elimination of the dependency test for husband's and widower's benefits.[65]

Of particular interest in this respect is the Task Force report repeatedly cited by appellant to support the differential at issue here. See Brief for the Appellant at 20, 27, 35. In calling to this Court's attention snippets from that report, appellant omitted to disclose what the Task Force concluded:

> The Task Force recommends the following immediate and long-range proposals to strengthen Social Security protection for women . . . .
>
> Benefit rights for dependents of women workers should be equalized by:
>
> . . .
>
> Eliminating the dependency requirement for husband's or widower's benefits.

Women and Social Security, Working Paper prepared by the Task Force on Women and Social Security for use of the

[65] See note 13 *supra.* Most of the recommendations call for elimination of the support test for husband's and widower's benefits, without further statutory alteration. *E.g.,* U.S. Commission on Civil Rights, Toward Elimination of Sex-Based Differentials in the Social Security System 10 (December 1974); S. 2860, 94th Cong., 2d Sess., 122 Cong. Rec. S5014 (daily ed. April 6, 1976) (Sen. Church, Chairman, Senate Committee on Aging); S. 1729, 94th Cong., 1st Sess., 121 Cong. Rec. S7949 (daily ed. May 13, 1975) (Sen. Bayh); H.R. 11555, 94th Cong., 2d Sess. (January 28, 1976) (Rep. Conlan). The Quadrennial Council proposal would couple elimination of the support test with a further revision so that a pension based on work in noncovered employment would affect entitlement to, and the amount of, secondary benefits. Cf. Note, 9 U. Mich. J. L. Ref. 138, 161 n.161 (1973) (1972-75 state legislative revisions equalizing workers' compensation survivors' benefits by presuming dependency of widowers as well as widows).

Special Committee on Aging, United States Senate, Committee Print, 94th Cong., 1st Sess. 39 (1975). See also *id.* at 16 ("[T]he wife's contributions purchase less in terms of dependents benefits. . . . Such explicit sex discrimination clearly calls for correction. The cost of removing these dependency requirements is low . . . ."), 17 (close scrutiny should be given to questions of equity and the treatment of married women's labor-force participation), 19-20 ("there is no sound reason for treating husbands and widowers differently than wives and widows"), 42 (if the §402 gender-based differentials are removed, "the working wife's contributions will have the same value as do her husband's in purchasing family protection").

In sum, the express remedial preference of Congress in all of its recent measures eliminating gender-based differentials, well-established judicial precedent and reasoned commentary[66] signal the direction for a court concerned with interim preservation rather than destruction of legislative policy. Elimination of benefits to a wage earner's spouse would conflict with a primary statutory objective. A cross-the-board dependency test would be inconsistent with the basic design of social security as an "earned right," not a public assistance program. Further, extension of the support requirement would impose an administrative burden of potentially monstrous proportion. Moreover, Leon Goldfarb commenced this action to secure benefits under his insured wife's account. Neither application of a dependency test cross-the-board nor elimination of survivors' benefits forms any part of his complaint. Cf. *Colburn* v. *Colburn*, 20 Md. App. 346, 353-54, 316 A.2d 283, 287-88

[66] See Notes, 89 Harv. L. Rev. 95 (1975); 49 Ind. L.J. 181 (1973).

(Md. Ct. App. 1974). Judicial resort to those "remedies" would not respond to the "case or controversy" Leon Goldfarb's complaint presents.[67] Under the circumstances, declaration of the invalidity of the §§402(c)(1)(C) and (f)(1)(D) one-half support stipulation is the only suitable judicial remedy.[68] 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) should be invalidated insofar as those provisions require proof that the female insured individual supplied at least one-half of her spouse's support. See *Frontiero*, 411 U.S. at 691 n.25.

[67] Since similarly circumstanced spouses of male wage earners have been accorded the benefit, the denial of equal protection to appellee can be repaired only by according him the benefit from the date of his application.

[68] The Court's tentative adjudication striking the support stipulation would bar only one final solution. Congress could not draw a gender line. But it could consider a full range of functional approaches, including measures that would yield a decrease, rather than any increase in benefit costs. See, *e.g.*, Quadrennial Council proposal, cited *supra*, notes 13 and 65; Women and Social Security, Working Paper, *supra*, at 77-79 (supplementary statement by Alvin M. David, Former Assistant Social Security Commissioner in charge of program evaluation and legislative planning).

CONCLUSION

For the reasons stated above, the decision of the district court declaring 42 U.S.C. §§402(c)(1)(C) and (f)(1)(D) unconstitutional insofar as these provisions discriminate on the basis of gender should be affirmed.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
KATHLEEN WILLERT PERATIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

NADINE TAUB
Women's Rights Litigation
Clinic
175 University Avenue
Newark, New Jersey 07102

Attorneys for Appellee

June, 1976

Attorneys for Appellee gratefully acknowledge the assistance provided in preparation of this brief by Columbia Law School students Lauren W. Field, Mary Elizabeth Freeman and Cathy Kaplan.

ADDENDUM

ADDENDUM

42 U.S.C. §402, in pertinent part, provides:

Wife's insurance benefits

(b)(1) The wife . . . and every divorced wife . . . of an individual entitled to old-age or disability insurance benefits, if such wife or such divorced wife—

(A) has filed application for wife's insurance benefits,

(B) has attained age 62 or (in the case of a wife) has in her care (individually or jointly with such individual) at the time of filing such application a child entitled to a child's insurance benefit on the basis of the wages and self-employment income of such individual,*

(C) in the case of a divorced wife, is not married, and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of such individual,

shall . . . be entitled to a wife's insurance benefit . . . .

Husband's insurance benefit

(c)(1) The husband . . . of an individual entitled to old-age or disability insurance benefits, if such husband—

---

* The child-in-care reference has no counterpart in §402(c)(1) (husband's insurance benefits). But see *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975).

(A) has filed application for husband's insurance benefits,

(B) has attained age 62,

(C) *was receiving at least one-half of his support* . . . from such individual [at the time she became entitled to old-age benefits]

. . .

and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, and,

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit . . . . (Emphasis supplied.)

Widow's insurance benefits

(e)(1) The widow . . . and every surviving divorced wife . . . of an individual who died a fully insured individual, if such widow or such surviving divorced wife—

(A) is not married,

(B) (i) has attained age 60 . . .

(C) (i) has filed application for widow's insurance benefits, or was entitled to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died . . . or

(ii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained age 65,* and

(D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of such deceased individual,

shall be entitled to a widow's insurance benefit . . . .

Widower's insurance benefits

(f)(1) The widower . . . of an individual who died a fully insured individual, if such widower—

(A) has not remarried,

(B) (i) has attained age 60 . . .

(C) has filed application for widower's benefits or was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which she died . . .

---

* The "mother's insurance benefits" reference has no "father's insurance benefits" counterpart in §402(f)(1) (widower's insurance benefits). But see *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975).

(D) (i) *was receiving at least one-half of his support* . . . from such individual at the time of her death . . .

(E) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit . . . . (Emphasis supplied.)